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# LEADING CASES

UPON

# THE LAW OF TORTS

SELECTED BY

GEORGE CHASE

PROFESSOR OF LAW IN THE NEW YORK LAW SCHOOL, NEW YORK CITY,  
AND DEAN OF THE LAW FACULTY

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SECOND EDITION

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## PREFACE.

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THIS collection of cases upon the Law of Torts is intended to supplement and illustrate the statements of legal principles which are set forth in the various treatises upon this subject. Object lessons, showing the application of principles, are as efficacious in the study of law as in the study of other branches of learning, and such lessons are afforded by the actual decisions made by the courts in specific instances. Such decisions may also exhibit the growth and development of legal doctrines. The aim has been to select the most valuable and important cases that could be found, giving a comprehensive view of the particular point or question discussed, and presenting the actual living law of to-day as the result of the long process of adjudication in England and in this country. Hence the volume comprises modern cases to a large extent, and in some instances these are among the most recent that have been issued.

The cases are printed in the same general form in which they appear in the regular reports, viz., with head-notes, statements of facts, and sometimes arguments of counsel, prefixed to the opinions. Running head-lines in bold-faced type, also, direct the attention of the reader to the principle treated of in the particular case that follows. Numerous other valuable cases are also cited after each of those that are printed in full, so that the reader can extend his researches more widely, if he so desires. These cited cases are also among the most important authorities upon the various points discussed. G. C.

NEW YORK, October, 1891.

## NOTE TO SECOND EDITION.

IN this edition cases of special value and interest that have been decided since the first edition was issued have been added to the text, or have been substituted, in some instances, for cases of less importance which the earlier edition contained. Extensive notes have also been appended to many of the cases, citing the recent authorities very fully and exhibiting the present condition of the law upon the various topics treated. It is hoped that the value of the book will be found much increased.

G. C.

NEW YORK, October, 1904.

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# LEADING CASES

UPON THE

# LAW OF TORTS.

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## GENERAL PRINCIPLES.

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**No tort committed, unless a legal right or legal duty is violated.**

(68 Ill. 478.)

**GUEST et al. v. REYNOLDS** (in part).

(Supreme Court of Illinois. September Term, 1873.)

**1. ADJOINING LAND-OWNERS—OBSTRUCTION OF LIGHT AND AIR.**

An owner of land who erects thereon a fence or wall which obstructs the access of light and air to a house on adjacent land, and also obstructs the view from such house, is not liable in damages for the obstruction to the owner of such adjoining premises, since no legal right to light, air, and prospect exists, in the absence of proof that such a right has been acquired by grant or prescription; nor is such fence or wall, not being constructed of offensive materials, to be deemed a nuisance.

**2. SAME—"ANCIENT LIGHTS."**

It seems that the doctrine of "ancient lights" is not applicable in this country.

Appeal from Circuit Court, Cook County; John G. Rogers, Judge.

**BREESE, C. J.** This was an action on the case, brought to the circuit court of Cook county, to recover damages for an alleged obstruction by defendants of the free use of the light and air passing laterally over the premises of defendants to plaintiff's premises.

The declaration contains two counts, in substance as follows: Plaintiff, after averring his residence on a particular lot, 73 South Sangamon street, in Chicago, in a house having doors, windows, and views of the street, through which light, air, and views had and ought to enter into the dwelling-house, and the views should not have been obstructed, and the use of the light and air and views should not have been obstructed, and ought to be used by plaintiff and his family, for

the wholesome use and occupancy thereof, avers: Yet the said defendants, well knowing the premises, but contriving, wrongfully and unjustly intending, to injure the plaintiff and his family, and to deprive them of the use of said doors, windows, and views, and to incommode him in the use and enjoyment thereof, and to annoy plaintiff in his use and possession and enjoyment of said premises, on, etc., wrongfully and injuriously caused and erected and raised a high board fence, and caused to be erected, constructed, and raised on the north part of said lot and dwelling-house and lot, and adjoining thereto, a high board obstruction. The obstruction was made and constructed next to the north line of the house and lot No. 73 South Sangamon street. It was made upon the south line of an alley next north of said house and lot, and close adjoining, and was so made and constructed, and is now standing, and in such close proximity, that it hides the original fences. It nowhere protects the alley, and it is so raised and constructed, and of such height, made at certain places in its construction, and so near to the windows, that it wrongfully and injuriously darkens the said dwelling-house, obstructs the light to said windows, and is so made as to obstruct the view to said street, and in fact is so constructed, wrongfully and injuriously, as aforesaid, as to interfere with the use of, and the light and air and views from, said dwelling house, and thereby renders said dwelling-house of but little use to plaintiff and his family; and defendants have wrongfully and injuriously kept and continued said high board fence obstruction, etc., by them erected, as aforesaid, for a long space of time, to-wit, etc.; and the same is now continued, by means of which premises the said dwelling-house, with its appurtenances, are greatly darkened and injured, and they continued darkened and injured, and the light, air, and views were and are hindered and prevented from coming into and through the said windows, into said dwelling-house, and the same hath thereby been rendered, and is, close, uncomfortable, unwholesome, and measurably unfit for habitation; and plaintiff and his family have thereby been, and still are, greatly annoyed and incommoded in the use, possession, and enjoyment of said dwelling-house and lot, with the appurtenances, to-wit, etc.; to the damage, etc. The second count, omitting the formal and introductory parts, avers: Yet the said defendants, well knowing the premises, but contriving, etc., and intending to injure and prejudice plaintiff, and to deprive him of the use, benefit, and enjoyment of the said windows, and to annoy and incommode him in the use, possession, and enjoyment of said dwelling-house, with the appurtenances, heretofore, to-wit, etc., (with a *continuando*.) wrongfully, maliciously, willfully, and injuriously greatly darkened said windows, and hindered and prevented the light and air from coming and entering into and through said windows, into said dwelling-house and premises, and the same have thereby been rendered, and are, uncomfortable, unwholesome and unfit for habitation, and the plaintiff thereby has been, and is, greatly annoyed and incommoded in the use, possession, and enjoy-

ment of said dwelling-house and premises, with the appurtenances, to his damage, etc. The plea was, not guilty. Under instructions from the court, the plaintiff had a verdict for \$838, a portion of which was remitted, and judgment rendered for \$500. To reverse this judgment defendants appeal.

We have copied literally the counts of the declaration, in order that the precise nature of the action may be seen and understood. Appellee claims that the gravamen of the action is not for obstructing light and air and views, but it is for erecting an unsightly fence and of offensive materials. The logic of the narr. certainly is that, plaintiff having the right to use the light and air and views, he has been deprived of the same by the erection of the fence, and by which erection his dwelling has been darkened, rendered unwholesome, and unfit for habitation. The latter is alleged as a consequence of the erection of the fence, and the right to build the fence is denied, because of plaintiff's right to have free course for light and air, and an unobstructed view from his windows. The gravamen of the action most clearly is the obstruction of light, air, and view, the rest being consequences, merely, of the obstruction. It is not alleged the materials which composed the obstruction—the fence—were of an offensive nature, or that the air, in passing through or over the fence, became charged with offensive matter. The averment simply is, by erecting a fence, the passage of light and air has been obstructed, by which the dwelling has been darkened, rendered unwholesome and unfit for habitation.

In this view of the nature of the action, the first question to be determined is, were defendants' lots, on the south boundary of which they erected this fence, servient lots? In other words, had the plaintiff any right to the passage of light and air laterally over defendants' lots, to plaintiff's doors and windows, and to an unobstructed view of an adjacent street? If he had, whence does he derive it? This is for him to show, and he has not shown it. He shows no right by prescription, by use for 20 years, if such use could be available, and no grant from any one. The owner of the premises erected the dwelling-house occupied by plaintiff within two feet of the south line of defendants' premises. We have been referred to no law forbidding defendants from erecting a fence on the line of their own land. Admit the erection does darken the rooms of his neighbor; that it does render them close and uncomfortable, and annoy and incommode him,—the defendants have only exercised a right belonging to them by building the fence. This is not a case of ancient lights. The plaintiff insists it is for a nuisance arising out of a violation of the maxim, *sic utere tuo ut alienum non lædas*. It is not denied that, by the common law, an action on the case lies for a nuisance to the habitation or estate of another, many instances of which are readily found in the books. The law unquestionably is, if a man erect anything offensive so near the house of another that it becomes useless thereby, case lies; as, a limekiln, a dye-house, a tallow furnace, a

privy, a brew-house, a tan-vat, a smelting-house, and the like. In all the cases where it was held the action would lie, a positive right was invaded. If this was a case of ancient lights, the maxim would apply. But, plaintiff having established no right, he cannot claim to be injured or damnified, as no right is infringed,—legally speaking, there is no injury or damage. The defendants cannot be charged with so using their own property as to injure another. By the fence the plaintiff has been deprived of the use of that which did not belong to him, for light and air are not the subjects of property beyond the moment of actual occupancy. *Mahan v. Brown*, 13 Wend. 261, 38 Am. Dec. 461; *Parker v. Foote*, 19 Wend. 309.

That the defendants had the right to build a fence 50 feet high, on their own land, or a high wall which should have the effect to deprive plaintiff of light and air, and obstruct his view, the plaintiff himself showing no prescriptive or other adverse right, is settled by authority. The case of *Gerber v. Grabel*, 16 Ill. 217, is referred to on this question. There the declaration did not prescribe for ancient lights, but declared generally, as in this case, that plaintiff was possessed of the house, and ought to enjoy a right to the light and air through the windows. The court held the declaration was sufficient to admit proof of the right, whether it arises upon a prescription, by contract, or otherwise by estoppel. The English doctrine was fully examined and admitted by one of the judges, Mr. Justice Scates delivering the opinion, that the rule in England was the presumptive prescription of 20 years, applied in analogy to the statute of limitations. But, he said, such was not the rule of the common law of this state; and, discussing the older authorities, from Rolle's Abridgment, through Coke, down to Croke's Eliz., to the accession of James I., the learned judge reached the conclusion that a prescription of 20 years for the easement of light and air was not applicable to the circumstances of this state, unsettled and unimproved as it is; that the doctrine cannot be traced further back than the twenty-first year of James I. As we understand this opinion, the right to the free passage of light and air must be established for a length of time whereof the memory of man runneth not to the contrary,—that is, from time immemorial; and this was the common law, as understood prior to the accession of James I. Another distinguished judge, Mr. Justice Caton, whose ability and great legal knowledge have never been questioned, understood the first section of chapter 62, Rev. St., adopted the common law of England as administered in Westminster Hall at the time the provision was originally adopted in this state, and the British statutes in aid of the common law prior to the fourth year of James I., except as provided in that section; and it was admitted that, by the well-settled rule of the common law, as it has been understood and administered by the English courts for many years past, 20 years' uninterrupted and unquestioned enjoyment of lights constitutes them ancient lights, in the enjoyment of which the owner shall be protected. This is the only case in this court we have

been referred to touching this subject, and from it it will be seen the law has not been authoritatively declared, enough only appearing in the record to dispose of the case then pending.

But be the law 20 years, or time immemorial, in which to prescribe, it cannot avail the plaintiff in this action, as he established neither.

The complaint in this declaration is for erecting an obstruction, by which light and air were prevented from coming into plaintiff's house, rendering the rooms dark, unwholesome, and uninhabitable. The point is that defendants had a right to erect the fence, which was the obstruction alleged. The plaintiff, showing no right to the free passage of light and air, must submit to this erection, in the absence of any allegation that the fence was made of unfit materials, the odor from which was of a noxious nature, which, penetrating the house of plaintiff, rendered it unwholesome. To entitle him to claim damages for the erection of a fence, by which his dwelling was darkened and made unwholesome, he must show a prescriptive right to the use of the light and air, which he does not pretend. He cannot make one case in his declaration, and another and different case by his proofs. He declares against the defendants that he is possessed of a dwelling-house, with doors and windows, to and through which light and air ought to come freely, but you, the defendants, have obstructed their free passage, by which my house is darkened, rendered unwholesome, and unfit for habitation. This is his whole case, as he states it in the declaration. We submit, it is not competent for him on the trial, to prove that the materials out of which the fence was made were filthy and unfit, or that they created an atmosphere in the house which was noxious, for that is an independent cause of action.

Now, on the question of prescription. As it is an open question in this court, we are inclined to adopt the views held and so well expressed by the supreme court of the state of New York in *Parker v. Foote*, supra. In commenting on the doctrine as received by the British courts, the court say: "They tell us a man may build on the extremity of his own land, and that he may lawfully have windows looking out upon the land of his neighbor." The court say the reason why he may lawfully have such windows should be because he does his neighbor no wrong; and yet, somehow or other, by the exercise of lawful right in his own land for 20 years, he acquires a beneficial interest in the land of his neighbor. The original proprietor is still seised of the fee, with the privilege of paying taxes and assessments; but the right to build on the land, without which city and village lots are of little or no value, has been destroyed by a lawful window. How much land can thus be rendered useless to the owner remains yet to be settled. And the court further say there is no principle upon which the modern English doctrine on the subject of lights can be supported. It is an anomaly in the law. It may do well enough in England, and has been sanctioned, with some qualification, by act of parliament, but it cannot be applied to the growing cities and villages of this country without working the most mischievous consequences, and has never been

deemed a part of our law. In *Myers v. Gemmel*, 10 Barb. 537, this case is approved. In 3 Kent's Comm. 573, it is said the English doctrine is not much relished in this country, owing to the rapid changes and improvements in our cities and villages. A prescriptive right, springing up under the narrow limitation in the English law, to prevent obstructions to window lights and views and prospects, or, on the other hand, to protect a house or garden from being looked in upon by a neighbor, would affect essentially the value of vacant lots, or of lots with low and back buildings upon them. To the same effect is Washburn on Easements and Servitudes, 497. We are disposed to concur in this view, and to hold it absurd to say that a man, by the exercise of rights over his own property for 20 years, can thereby acquire a title in the property of another. Such a doctrine is not applicable to our growing cities and villages, and was not the doctrine of the common law, as expounded in Westminster Hall prior to the fourth year of the reign of James I. These views render it unnecessary to consider the instructions given in this case, as it is readily seen some of them were not applicable. As we understand the declaration, there is no cause of action stated in it to entitle the plaintiff to a recovery, and we must reverse the judgment. The judgment is therefore reversed, and the cause remanded.

#### Judgment reversed.

(The general rule is stated as follows: "At common law a man has a right to build a fence or other structure on his own land as high as he pleases, although he thereby completely obstructs his neighbor's light and air, and the motive by which he is actuated is immaterial." *Karasek v. Peier*, 22 Wash. 419, 61 Pac. 33, 50 L. R. A. 345; *Camfield v. U. S.*, 167 U. S., at page 523, 17 Sup. Ct. 866, 42 L. Ed. 260; *Mahan v. Brown*, 13 Wend. 261, 38 Am. Dec. 461; *Levy v. Brothers*, 4 Misc. Rep. 48, 23 N. Y. Supp. 825; *Letts v. Kessler*, 54 Ohio St. 73, 42 N. E. 765, 40 L. R. A. 177; *Triplett v. Jackson*, 5 Kan. App. 777, 48 Pac. 931; *Saddler v. Alexander*, 56 S. W. [Ky.] 518; *Metzger v. Hochrein*, 107 Wis. 267, 83 N. W. 308, 50 L. R. A. 305, 81 Am. St. Rep. 841 [fence unsightly and made of old lumber, partly rotten, defendant acting from malicious motives]; cf. *Phelps v. Nowlen*, 72 N. Y. 39, 28 Am. Rep. 93. But in some states it is now the law—in several of them, by statute—that if such an act be done maliciously, it affords a cause of action. *Lord v. Langdon*, 91 Me. 221, 39 Atl. 552; *Rideout v. Knox*, 148 Mass. 368, 19 N. E. 390, 2 L. R. A. 81, 12 Am. St. Rep. 560; *Whitlock v. Uhle*, 75 Conn. 423, 53 Atl. 891; *Horan v. Byrnes*, 70 N. H. 531, 49 Atl. 569; *Flaherty v. Moran*, 81 Mich. 52, 45 N. W. 381, 8 L. R. A. 183, 21 Am. St. Rep. 510; *Karasek v. Peier*, supra; cf. *Bros-trom v. Lauppe*, 179 Mass. 315, 60 N. E. 785; *Kuzniak v. Kozminski*, 107 Mich. 445, 65 N. W. 275, 61 Am. St. Rep. 344.

The doctrine of "ancient lights" has been almost universally discarded in this country as not suited to our conditions. *Keats v. Hugo*, 115 Mass. 204, 15 Am. Rep. 80, and cases cited; *Hayden v. Dutcher*, 31 N. J. Eq. 217; *Knabe v. Levelle* [Super. Ct. N. Y.] 23 N. Y. Supp. 818; *Tinker v. Forbes*, 136 Ill. 221, 26 N. E. 503; *Tunstall v. Christian*, 80 Va. 1, 56 Am. Rep. 581; 1 Wood on Nuisances [2d Ed.] 196; *Cooley on Torts* [2d Ed.] 833. But in England the doctrine is still maintained. *Colls v. Home and Colonial Stores* [1904] A. C. 179.)

(104 N. Y. 471, 11 N. E. 57.)

MILLER v. WOODHEAD.

(Court of Appeals of New York. March 1, 1887.)

## NEGLIGENCE—DANGEROUS PREMISES—LANDLORD AND TENANT.

Rooms, the windows of which overlooked an extension of the same house, were let by the owner of the whole building to a tenant, with the right to the latter to use the roof of the extension for drying clothes. In the roof near the windows was a sky-light, covered with a wire screen for the protection of the glass in it, but the screen was in bad condition, and was afterwards removed. Before it was replaced, plaintiff, a child about three years of age, while visiting the tenant, fell out of the window, through the sky-light, and was injured. *Held*, that the owner of the house was not liable to plaintiff for such injuries; there was no violation of any duty which he owed plaintiff; and, even if the screen was necessary to render the roof fit for the use of the tenant, plaintiff could not take advantage of any violation of the owner's duty to the tenant in that respect, as he was not, at the time of the accident, connected in any way with the tenant in the use of the roof.

Appeal from Supreme Court, General Term, First Department.

Action by Samuel L. Miller, an infant, against Richard Woodhead, to recover damages for personal injuries to plaintiff alleged to have been caused by defendant's negligence.

PECKHAM, J. The defendant was the owner of a house in Thirty-Third street, New York, some rooms in which he had rented to a Mrs. O'Brien, who was the step-mother of the plaintiff's mother, the plaintiff being an infant of about the age of three years. Mrs. O'Brien had three rooms in the rear of the house, overlooking an extension thereof, which was covered with a tin roof, and in which there was a sky-light to give light to a saloon situated in such extension. Mrs. O'Brien had leased the right to use this roof for the purpose of hanging out and drying her clothes, and when she rented the rooms the defendant had cautioned her about not letting children out on the roof, because the ceiling was very bad, and she had never allowed them to go there. This tin roof was about a foot below the windows of Mrs. O'Brien's rooms, which looked out on it. About 16 or 18 inches from the wall in which the windows were set the sky-light in question was situated, so it was about a foot below the windows, and 16 inches away from the wall. The sky-light had panes of glass in it, and there had been a wire screen over the glass, made of long and small wires, very thin, and in bad condition,—old and rotten. This screen had been taken off the sky-light some six weeks prior to the accident, and, at the time of its occurrence, had not been replaced. The glass in the sky-light would have been very likely broken if not covered, as the boys used to climb up a ladder and play ball about there. The sill of the windows from the floor inside was about 23 inches, and, in order to go out on the roof from the rooms occupied

by Mrs. O'Brien, it was necessary to raise the window and crawl through the lower part of it. The permission given by the defendant was to Mrs. O'Brien to go out on the roof and dry her clothes there. There were no bars on the window, and if there had been she says she would not have taken the premises. On the day in question the mother of plaintiff, with a babe in her arms, and accompanied by plaintiff, called at Mrs. O'Brien's, and, as they went in the room, plaintiff's mother started to put the babe on a bed in the bed-room off the kitchen, and was gone but a few seconds, when Mrs. O'Brien saw the plaintiff, who had gone to the window, tumbling out. She caught sight of him just as he was disappearing. He fell through the sky-light, and sustained injuries to his head, etc., for which he brought this action. Mrs. O'Brien gave it as her opinion "that, if the wire had been on, it had been all right for the boy." From her own description, it is perfectly obvious the wire screen was not placed there to catch people, or prevent their falling through the sky-light, but for the purpose of saving the glass in the sky-light. The plaintiff recovered a verdict, which has been affirmed at the general term, and the defendant appeals here.

Upon the case as made by the plaintiff, we are unable to see that any proof was given of the violation of any duty which the defendant owed to the plaintiff. The roof over the saloon, or the sky-light therein, was not a dangerous structure, and defendant had given no invitation, and issued no license, expressed or implied, to plaintiff to go upon the roof. Mrs. O'Brien had the right to go on it for the purpose suggested, and very likely any agent or servant of hers engaged in that occupation for her. This is no such case. If there had been no roof at this place, the plaintiff would, on falling out of the window, have come to the ground. Can it be contended, in such case, the defendant would have been liable? If not, how is his liability increased by the fact that there is a roof just below these windows, but in it there is a sky-light which a child's weight could break? If the defendant owes no duty in the one case to build a roof or a wall or any other structure under these windows to catch people who fall out of them, how is his liability increased when he does build a structure with a roof, but which does not absolutely prevent one from falling through it because of a sky-light?

But the liability seems to have been placed, in the court below, upon the duty which it is said the defendant owed Mrs. O'Brien to furnish her a reasonably safe roof when he let her the right to go upon it to dry clothes. If that be assumed, we do not see how plaintiff is aided. Mrs. O'Brien was not injured, nor any of her servants, by reason of the unfitness of the roof for the purpose for which it was to be used by her or them. The plaintiff was not injured while he was using the roof at all. He simply fell out of a window, (as the evidence shows beyond all question,) and thus received his injury. What had the liability (whatever it was) of defendant to Mrs. O'Brien to do with this question between plaintiff and himself, as the plaintiff was not

using the roof for any purpose whatever? Conceding that to fulfill his obligations to Mrs. O'Brien, and to render the roof fit for her to use for the purpose spoken of, this wire screen was a necessity, and that if it had been there on this occasion the plaintiff would not have been hurt, still there was no duty owing by him to this plaintiff to have the roof in that condition, so that he could be caught when he fell out of the window, and the injury thus be averted. The duty of defendant to Mrs. O'Brien, in order to fulfill his contract with her in granting her permission to use the roof, is one thing; but the plaintiff cannot take advantage even of its violation, unless at the time when the accident happened he was himself in some way connected with her, as in the performance of the duty for her, or in using the roof with her license, (even if that would raise a duty,) and in carrying out some right which she had herself. This case has none of these features. The duty of defendant may be one thing to Mrs. O'Brien and quite another to the plaintiff. *Larmore v. Iron Co.*, 101 N. Y. 391, 4 N. E. 752, 54 Am. Rep. 718. We think this case not distinguishable in principle from *McAlpin v. Powell*, 70 N. Y. 126, 26 Am. Rep. 555. The judgment of the general term and of the circuit should be reversed, and a new trial ordered, costs to abide event. All concur.

(A case of quite similar character is *Galligan v. Metacomet Mfg. Co.*, 143 Mass. 527, 10 N. E. 171. Other interesting cases holding that there is no tort where no legal duty exists are the following: Plaintiff's horse ate the leaves of a yew tree growing on defendant's adjacent land, the branches of which did not extend over the boundary line, and died therefrom. Held, that plaintiff had no cause of action. *Ponting v. Noakes*, [1894] 2 Q. B. 281. Plaintiff's country house had been called "Ashford Lodge" for 60 years, and defendant's adjoining house had been called "Ashford Villa" for 40 years. Then defendant adopted the name "Ashford Lodge." Plaintiff alleged that this caused him great inconvenience and annoyance and had diminished the value of his property, but it was held on demurrer that no legal right had been violated. *Day v. Brownrigg*, L. R. 10 Ch. Div. 294.)

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(86 Pa. 74.)

**GRAMLICH v. WURST et al.**

(Supreme Court of Pennsylvania. January 28, 1878.)

**NEGLIGENCE—DANGEROUS PREMISES—INJURY TO TRESPASSER.**

A lawful occupant of land, who makes an excavation thereon for a lawful purpose and in the accustomed manner, at a distance from any public highway, is not liable for injuries received by a trespasser from falling into the excavation.

Error to Court of Common Pleas, Philadelphia County.

Action on the case by Mary Wurst and others, the widow and infant children of John A. Wurst, deceased, against Frederick Gram-

lich, for damages for the death of said John A. Wurst, alleged to have been caused by defendant's negligence.

At the trial defendant submitted several points, among them the following: "(3) The place of this excavation being on private property, and not on any line of street or public highway, but some distance therefrom, the said decedent, not being engaged in any manner whatever by the said defendant or his agents, had no right to be there, and was a trespasser, and the verdict should have been for the defendant." The judge presiding at the trial refused this point, and instructed, in part, the jury as follows: "Now, as to the defense, it is contended by defendant: First. That there is no direct evidence how the accident happened, and therefore no sufficient evidence of defendant's negligence. In support of this view, defendant's counsel has called your attention to the fact that Wurst, when he fell in, was not on his route home from the place where he was last seen at work. His home was in another direction. Further, he was a trespasser on the lot where the excavation was, and had no legal right to be there at all. I instruct you that those facts do not absolutely prevent a recovery by the plaintiffs. A man is bound to exercise reasonable care even towards a trespasser. But these facts bear very strongly on the question of what was reasonable care on the part of defendant under the circumstances,—in other words, of his negligence; and also of the negligence of the deceased. A trespasser is bound to proceed with more care than where he has a right, and, on the other hand, the defendant was not, in ordinary circumstances, bound to anticipate a trespass. Secondly. Has the plaintiff proved to your satisfaction that, under all the circumstances of the case, the defendant was guilty of negligence?" And after reviewing the evidence the judge continued: "Now, you are to judge from all this evidence whether the defendant was negligent in leaving his excavation without lights and without a fence, under the special circumstances of that night. There had been a serious accident, resulting in loss of life, and there was, according to all the testimony, a crowd of people about the place all the afternoon. This in itself would impose on the defendant more care in regard to his excavation than under ordinary circumstances. It increased the danger of injury to trespassers, as to whom, as I have already said, the defendant owed the duty of a reasonable care; not such degree of care as required as to people who should be habitually and lawfully there, but such as, under all circumstances, was reasonable to require, even as to others. In judging of this care, however, the defendant is entitled to have you consider the facts that this was an extraordinary occurrence, such as he was not bound to and in fact could not anticipate; that the street was not opened through for public travel; that the ground between the fallen ice-house and the edge of this excavation was not only steep and up-hill, but was also incumbered with piles of lumber and the débris of the fallen ice-house, so as to make it unlikely that any one would clamber over them from that direction; and, in general, the want of probability

that any person would be injured by falling into his excavation. Lastly. You will consider the question whether the deceased was negligent in going towards the cellar on a dark and rainy night," etc. The judge then stated the law as to contributory negligence, and, calling the attention of the jury to the care incumbent on deceased under the circumstances, instructed them that contributory negligence on his part would bar a recovery. The jury found a verdict for plaintiffs for \$4,000. Plaintiffs subsequently filed a remittitur of \$1,000 of that amount. Defendant sued out a writ of error, and assigned as error the refusal of the judge to affirm the point mentioned.

Argued before AGNEW, C. J., and SHARSWOOD, MERCUR, GORDON, PAXSON, WOODWARD, and TRUNKEY, JJ.

WOODWARD, J. John Adam Wurst was killed by falling into a vault which Frederick Gramlich, the defendant below, was employed in excavating on a lot belonging to Adam Miller, on the east side of Thirty-First street, above Jefferson. The work was done under a contract between Gramlich and Miller, and for the purposes of the contract Gramlich had exclusive possession of the lot. Another person had fallen into the vault, and, in approaching to aid him in response to his cries for help, it is probable that Wurst met with the accident that caused his death. In falling, his head struck the shaft of a cart that was in use in doing the work, and which had been left overnight in the excavation. It was after dark, on the evening of the 13th of February, 1874, that the accident happened. On the morning of that day the roof of an ice-house on a lot of Henry Miller, intervening between Adam Miller's land and Jefferson street, had broken down, and Wurst, who was a carpenter, had been at work on that building during the whole of the afternoon. Michael Gossey, one of the witnesses for the plaintiffs, said he saw him about half past 3 o'clock on the top of the brewery getting wood down, and Henry Miller said: "Wurst was there before I was, clearing off the roof. It was a little after 12 o'clock when I arrived there. As long as I stood there he was working there. He was there until after seven o'clock. He was hauling away timber. It was hauled to the north side, between my brewery and the vault Mr. Gramlich was digging." There was an open space between Henry Miller's building and Adam Miller's line, and from the account which the plaintiffs gave of Wurst's employment during the day the fact that the excavation was being made must have been known to him, and the situation of the vault when the work ceased that evening must have been within his view. When he fell he was passing from the land of Henry Miller near the rear of Adam Miller's lot, and perhaps 80 feet eastwardly from the Thirty-First street front.

Under these facts,—and all of them that are material are gathered from the testimony on behalf of the plaintiffs,—what duty did Gramlich owe to Wurst? The contract for digging the vault was a perfectly lawful one, and it has not been alleged that the work was done

otherwise than in the accustomed way. It was all done within Adam Miller's lines. No adjacent land was encroached upon, and no danger to passengers on any highway was created. Indeed, there was no highway to be involved in danger. Thirty-First street, north of Jefferson, had only been opened along the property of Henry Miller, and the surface of Adam Miller's lot at the line of the street was from 10 to 15 feet above its established grade. There was some conflicting testimony as to paths alleged to have traversed the lot, but, if there were such paths, they extended eastwardly or north-eastwardly in the direction of a lampblack factory, and it was not contested that Wurst fell into the vault as he approached it from the southern side. The existence or non-existence of paths across the property was immaterial. In the ordinary case, a jury must pass upon evidence given in support of a charge of negligence. They must do this always when the measure of duty is ordinary and reasonable care, and the standard of the degree of care shifts with the change of circumstances. And they must do it also where essential facts are controverted. But where there is no conflict of testimony, and either the standard of individual duty has been judicially determined, or the rights of owners of property have been judicially defined, the decision of a question of negligence affecting individual action in the one case, or the exercise of dominion over property in the other, becomes the duty of a court. Negligence is to be found upon evidence, and is not to be presumed from the bare fact of the occurrence of an accident on a defendant's land. Gramlich was in the lawful occupancy of the lot on which Wurst was killed, and was engaged in an employment that was entirely legitimate. In the absence of evidence to show the existence of exceptional hazards, he was not required to provide exceptional safeguards. An owner of land may improve it in his own time and in his own way, so that he violates no duty that he owes to any adjacent owner or to the public. A case as old as *Blyth v. Topham*, Cro. Jac. 158, held that "an action doth not lie if a man makes a ditch in his own waste, which lies near the highway, into which the horse of another falls; for the ditch in his own soil was no wrong to the other, but it was his fault that his horse escaped into the waste." Where A, who was the owner of a store-house and lot, left at the rear of the store-house an excavation walled up to give light to the cellar, and B, who, on an alarm of fire, went down to the store-house, adjoining the house in which the fire was, and, entering at the front door, went through the store, and, going through the back door, turned off the gangway across the opening, and fell in and was injured, it was held that the digging of an open space in the rear of the store-house by A, upon his own ground, was a lawful act by him, and he had the right to keep it there as an appurtenant right for the use of his property; and B falling in by accident, the same not being near a public street or crossing, gave no right to recover damages from A as a wrong-doer, and B's going there on account of the fire did not change the rule. *Kohn v. Lovett*, 44 Ga. 251. The law fully

recognizes the right of him who, having the dominion of the soil, without malice does a lawful act on his own premises, and leaves the consequences of an act thereby happening where they belong,—upon him who has wandered out of his way, though he may have been guilty of no negligence, in the ordinary acceptation of the term. It is purely *damnum absque injuria*. *Morgan v. City of Hallowell*, 57 Me. 377. “When an excavation is made adjoining to a public way, so that a person walking on it might, by making a false step, or being affected with sudden giddiness, fall into it, it is reasonable that the person making such excavation should be liable for the consequences. But when the excavation is made at some distance from the way, and the person falling into it would be a trespasser upon the defendant’s land before he reached it, the case seems to me to be different.” *Martin, B., in Hardcastle v. Railway Co.*, 4 Hurl. & N. 67. So where the defendants were owners of waste land which was bounded by two highways, and they worked a quarry in the waste, and the plaintiff, not knowing of the quarry, passed over the waste in the dark and fell into the quarry and broke his leg, and then brought an action for the injury, it was held that the action could not be maintained, as there was no legal obligation on the defendants to fence the quarry for the benefit of the plaintiff, who was a mere trespasser on the land. *Hounsell v. Smyth*, 7 C. B. (N. S.) 731. This rule was laid down by Chief Justice Gibson in *Knight v. Abert*, 6 Pa. 472, 47 Am. Dec. 478, which decided that, though no action lies in Pennsylvania for trespass by cattle pasturing on uninclosed woodland, yet that, not being a matter of right, the owner of the land is not liable for injuries sustained by such cattle falling into a hole dug by him within the boundaries of his land, and left uninclosed. And the opinions of Mr Justice Strong in *Railroad Co. v. Hummell*, 44 Pa. 378, 84 Am. Dec. 457, and of Mr. Justice Sharswood in *Gillis v. Railroad Co.*, 59 Pa. 129, 98 Am. Dec. 317, illustrated and enforced substantially the same rule.

Reliance has been placed on the case of *Hydraulic Works Co. v. Orr*, 83 Pa. 332, to support this judgment. The distinction between that case and this is marked and obvious. There the accident happened in a private passage or cartway adjoining a factory, where several kinds of business were carried on in different stores, and was caused by the falling of a heavy platform employed as an inclined plane to move heavy articles into and out of the building. When used, it was lowered so as to cover the pavement of the cartway. When not in use, it was raised on hinges that connected one side of it within 18 inches of the wall, was not fastened at the upper side, and was so nearly at equipoise that slight force only was required to draw it down. The cartway opened from a public street, where people were constantly passing and children were often at play. There was a gate at the street end, and this was frequently left open. It was so left at the time of the accident, when four children intruded into the cartway, and their thoughtless tampering with the platform

resulted in drawing it down upon themselves, and in producing injury to the child of the plaintiffs from which he died. This court affirmed a verdict and judgment for damages in the common pleas. No cause was ever more justly decided. It was the case suggested by Baron Martin in *Hardcastle v. Railway Co.*, of a dangerous appliance adjoining a public way. The children were trespassers certainly, but then they were children, and the defendants were bound to have regard to the reckless and thoughtless tastes and traits of childhood. The entrance to the cartway was open and unguarded, and the facts in the record showed the strong probability of danger from the structure. It had once fallen against the wheels of a wagon, and when other wagons passed it was held up by hand. Even a trespasser may have redress for negligent injuries inflicted on him. Though he is liable to an action for his own wrong, he does not necessarily forfeit his right of action for injuries he has sustained, as, for example, by falling into a hole newly excavated on a defendant's premises adjoining a public way, and rendering it unsafe to persons lawfully using the same with ordinary care. *Barnes v. Ward*, 9 C. B. 392, 420. The owner of open land has no right to plant in it spring-guns by which ordinary trespassers may be wounded. *State v. Moore*, 31 Conn. 479, 83 Am. Dec. 159. In this country, while a house may be thus protected from burglars, no man has a right to place on his land any instruments to injure persons merely straying on such land. *Johnson v. Patterson*, 14 Conn. 1, 35 Am. Dec. 96. A party may be acting in violation of some particular statute, and still be under the general protection of the law. *Spofford v. Harlow*, 3 Allen, 176. *Hydraulic Works Co. v. Orr* rested on principles and precedents that sustained it amply, but which have no application here. The undisputed facts proved the defendant to have been guiltless of all wrong, and the prayer for instruction to the jury that he was entitled to a verdict should have been granted.

Judgment reversed.

(See also for similar cases, *Railroad Co. v. Schwindling*, 101 Pa. 258, 47 Am. Rep. 706; *Gillespie v. McGowan*, 100 Pa. 144, 45 Am. Rep. 365; *Horstieck v. Dunkle*, 145 Pa. 220, 23 Atl. 378, 27 Am. St. Rep. 685; *Peters v. Bowman*, 115 Cal. 345, 47 Pac. 113, 598, 56 Am. St. Rep. 106.)

**The violation of a moral right or duty, unless it also amounts to a legal right or duty, does not constitute a tort.**

(11 Pick. 527.)

**LAMB v. STONE.**

(Supreme Judicial Court of Massachusetts. October Term, 1831.)

**FRAUD—PURCHASE OF PROPERTY FROM ABSCONDING DEBTOR.**

A creditor cannot maintain an action for fraud against one who has fraudulently purchased from the debtor property of the latter subject to attachment, and aided him to abscond, thereby preventing the creditor from arresting the debtor or attaching his property, or otherwise obtaining satisfaction of the debt; the creditor having had no lien or claim upon or interest in the property so purchased. Though the defendant's fraudulent act is a moral wrong, no legal right of the creditor is violated thereby.

**Motion in Arrest of Judgment.**

Action on the case by Joseph Lamb against Richard Stone. The declaration contained five counts, of which the fourth alleged that one Thompson, at a place and on a date stated, was justly indebted to the plaintiff in the sum of \$56.13, and was possessed of certain property, to-wit, etc., of great value, to-wit, \$250; and the defendant, well knowing the premises, and fraudulently contriving to deprive the plaintiff of the means of obtaining payment of his debt, and in order to aid and abet Thompson in his designs to evade payment of it, and thereby prevent the plaintiff from collecting and recovering it of Thompson, which he was about to do by due process of law, did fraudulently and wrongfully, and with an intent the plaintiff thereby to defraud and injure, take and receive the property from Thompson, and convert it to his (the defendant's) own use, and thereby prevented the plaintiff from collecting his debt by attaching and selling the property by due process of law, as he might and would otherwise have done; whereby the plaintiff has been ever since prevented from recovering his debt of Thompson, and wholly deprived of the benefit of the same, and the same is still due and unpaid. The fifth count alleges that whereas Thompson, at the same place and on the same date, was indebted to the plaintiff in the sum of \$56, and was fraudulently and wrongfully contriving and intending to prevent the plaintiff from recovering the same of Thompson by putting out of his possession the property and estate of which he was possessed, so that the same could not be come at to be attached by due process of law, and avoiding the process of law provided for the collection of debts, by going out of the commonwealth and the reach of said process,—of all which the defendant was then and there well knowing,—he, the defendant, did, in order to aid and abet Thompson in his wrongful and fraudulent intent, and with the intent to injure and defraud the plaintiff of his demand against Thompson, take into his possession,

purchase and receive the property and estate of Thompson, then and there being found, of great value, to-wit, \$250, and did fraudulently, and with the intent to deprive the plaintiff of the means of recovering his debt of Thompson, aid, abet, and assist Thompson to avoid the process of law provided for the collection of debts, by departing out of the commonwealth, which Thompson did, and has ever since remained without the reach and effect of the legal process of the commonwealth, in foreign parts, to-wit, in the state of Vermont, whereby the plaintiff was deprived of the means of collecting his debt, as he might and would otherwise have done, and was about to do, by attaching the property or arresting the body of Thompson by due process of law; and has ever since been deprived of his debt, and all means of collecting the same or enforcing payment thereof, and has wholly lost the same, and has been otherwise greatly injured by the fraudulent doings of the defendant as aforesaid. The defense was the general issue. At the trial the jury found a general verdict for plaintiff. Defendant moved in arrest of judgment, on the ground that the declaration set forth no sufficient cause of action.

MORTON, J. This case comes before us on a motion in arrest of judgment. The verdict of the jury establishes every material allegation in the plaintiff's declaration; and every fact substantially set forth is to be taken to be true. The question for our decision is whether these facts are sufficient to entitle the plaintiff to judgment. Although the verdict is general, yet in this case, if either count is good, the verdict may be applied to that count, and judgment be rendered upon it. The following are all the material allegations contained in either of the counts: That the plaintiff had a just debt due him from one Thompson; that the latter had property liable to attachment sufficient to pay this debt; that the defendant took a fraudulent conveyance of this property; that Thompson has absconded from the state; that the plaintiff has not been able to arrest him, to attach his property, or otherwise to obtain satisfaction of his debt; and that the acts done by the defendant were done with intent to defraud the plaintiff, by preventing him from securing or getting satisfaction of his debt. Some of these are omitted in several of the counts, but no one contains any other material allegation. Will these facts support an action?

Before proceeding to the investigation of the main question, it may be proper to remark that the declaration contains no averment that Thompson is insolvent, or that he has not, where he now resides, property liable to be taken sufficient to satisfy the debt, or that any suit has ever been commenced against him, or any attempt made to arrest his body or attach his property; nor is it alleged, except by implication, that he has not in this state real estate or personal property, other than that transferred to the defendant, liable to attachment. It ought also to be further remarked that this is not an action of conspiracy or of case in the nature of conspiracy. It is not founded

upon any illegal combination or confederacy. The declaration does not set forth any conspiracy to defraud the plaintiff or to evade or defeat any legal process. No such fact can be presumed to exist, and therefore we have no occasion to determine what effect such an averment would have. It will, however, be perceived that some of our reasoning would apply to such an action as well as the one before us.

This is a special action on the case, depending upon the precise facts set forth in the declaration. It is an action of new impression. It is admitted that no precedent can be found for it. This circumstance of itself forms a pretty strong objection. It ought, however, to have less weight in this than any other form of action. In the diversified transactions of civilized life, new combinations of circumstances will sometimes arise which will require, in the application of well-settled principles of law, new forms of declarations. Among the old and wise axioms of the law, none are more sound than those upon which the plaintiff attempts to found this action. In law, for every wrong there is a remedy. 3 Bl. Comm. 123; *Ashby v. White*, 1 Salk. 21. Whenever the law creates or recognizes a private right, it also gives a remedy for a violation of it. 1 Chit. Pl. 83; *Yates v. Joyce*, 11 Johns. 140. The general principle, that whenever there is fraud or deceit by the one party and injury to the other, or *damnum cum injuria*, there an action will lie, is very often referred to with approbation, and always recognized as good law. *Upton v. Vail*, 6 Johns. 182, 5 Am. Dec. 210; *Pasley v. Freeman*, 3 Term R. 51; *Eyre v. Dunsford*, 1 East, 329. But these principles, however sound, must be understood with such qualifications and limitations as other principles of law equally sound necessarily impose upon them. It is very clear that there may be many moral wrongs for which there can be no legal remedy. And there may be legal torts in which the damage to individuals may be very great, and yet so remote, contingent, or indefinite as to furnish no good ground of action. 3 Term R. 63. Without entering further into the explanation of these principles, their extent, qualifications, or limitations, we will proceed to inquire how far they may be relied upon in support of this action. To render them applicable, the plaintiff must show that he has sustained damage from the tortious act of the defendant, for which the established forms of law furnish him no remedy. If he may have redress by any of the forms of actions now known and practiced, it would be unwise and unsafe to sanction an untried one, the practical operation of which cannot be fully foreseen. The court will adopt a new remedy to prevent the failure of justice, or to enforce the settled principles of law, but never when justice can be attained by any of the remedies already known to the law. Com. Dig. "Action on the Case," B. 8.

The gist of the injury complained of is the fraudulent purchase by the defendant of the property of the plaintiff's debtor. If the sale was fraudulent, it might be avoided by the creditors, and the property was liable to attachment after as well as before the conveyance. The fraud could be established quite as easily in a suit for the chattels

themselves as in the present case. There is no averment that the defendant had concealed the property, removed it out of the commonwealth, or in any other way so disposed of it that it could not be attached. But even if it were so, and the property could not be come at to be attached specifically, yet it might be attached in the defendant's hands by the trustee process. In this event the defendant would be compellable to disclose all the circumstances attending the transaction on oath, and, if he did not answer truly, would be liable to a special action on the case, by St. 1794, c. 65, § 9. It would be difficult to show any good reason why the plaintiff might not obtain legal justice in the one or the other of these modes, as easily and surely as by the present action. *Burlingame v. Bell*, 16 Mass. 320; *Devoll v. Brownell*, 5 Pick. 448.

It was said in argument by the plaintiff's counsel that, if he resorted to the trustee process, the defendant would be entitled to any equitable set-off which he might have against his principal; that, if he had made advances or paid debts in good faith, he would be allowed to apply them towards satisfaction for the property conveyed to him; and so the plaintiff could not avail himself of the full value of the property. *Andrews v. Ludlow*, 5 Pick. 32; *Ripley v. Severance*, 6 Pick. 474, 17 Am. Dec. 397; *Type & Stereotype Foundry Co. v. Mortimer*, 7 Pick. 166, 19 Am. Dec. 266. And why should it not be so? If the defendant paid bona fide the value of the property, the plaintiff is not injured. The owner had good right to sell to whom he pleased, and to prefer any other of his creditors to the plaintiff. If the fraudulent conduct of the defendant has done no injury to the plaintiff, he cannot complain. He cannot have the aid of the law to speculate upon the defendant's fraud. The law will protect him from damage, but will not enable him to derive advantage from the fraudulent conduct of the defendant. This action, if sustained, would establish a precedent which would produce in practice great inconvenience, and oftentimes do manifest injustice. If the plaintiff may maintain this action against the defendant, so may every creditor of Thompson. The plaintiff had done nothing to give him priority. Shall the fraudulent purchaser be holden to pay all the debts of the fraudulent vendor? Justice does not require this. The conveyance might be fraudulent in law, and yet there might be no moral turpitude in the transaction. The property conveyed might be very small, and the debts very large. Shall the value of the property transferred be apportioned among all the creditors? By what rules shall the apportionment be made? Shall the creditor who first sues be entitled to the whole, if his debt be large enough to require the whole for its satisfaction? If one creditor should attach the property specifically, another should summon the fraudulent vendee as trustee of the vendor, and a third should commence an action like this, which would have the preference? Can the same party resort to more than one of these remedies at the same time? And would the judgment in the one be a bar to the other? Many cases might occur in which it would be ex-

tremely difficult to adopt any rule of damages which would do justice to all the parties interested.

But besides these practical inconveniences, which are of themselves insurmountable, there is another objection fatal to the present action. The injury complained of is too remote, indefinite, and contingent. To maintain an action for the deceit or fraud of another, it is indispensable that the plaintiff should show, not only that he has sustained damage and that the defendant has committed a tort, but that the damage is the clear and necessary consequence of the tort, and that it can be clearly defined and ascertained. What damage has the plaintiff sustained by the transfer of his debtor's property? He has lost no lien, for he had none. No attachment has been defeated, for none had been made. He has not lost the custody of his debtor's body, for he had not arrested him. He has not been prevented from attaching the property or arresting the body of his debtor, for he never had procured any writ of attachment against him. He has lost no claim upon or interest in the property, for he never had acquired either. The most that can be said is that he intended to attach the property, and the wrongful act of the defendant has prevented him from executing his intention. Is this an injury for which an action will lie? How can the secret intentions of the party be proved? It may be he would have changed this intention. It may be the debtor would have made a bona fide sale of the property to some other person, or that another creditor would have attached it, or that the debtor would have died insolvent before the plaintiff could have executed his intention. It is therefore entirely uncertain whether the plaintiff would have secured or obtained payment of his debt, if the defendant never had interfered with the debtor or his property. Besides, his debt remains as valid as it ever was. He may yet obtain satisfaction from property of his debtor, or his debtor may return and pay him. On the whole, it does not appear that the tort of the defendant caused any damage to the plaintiff. But even if so, yet it is too remote, indefinite, and contingent to be the ground of an action.

Among the many cases cited by the plaintiff's counsel, those of *Adams v. Paige*, 7 Pick. 542; *Yates v. Joyce*, 11 Johns. 136; and *Smith v. Tonstall*, Carth. 3,—bear the greatest resemblance to the case at bar. But an examination of these cases will not only show that there is an obvious and broad distinction between them and the one under consideration, but that the principles adopted in all of them support the ground now taken by the court. In *Adams v. Paige* the plaintiffs had made an attachment of the property of their debtor. The two defendants, one of whom was the debtor, had caused a previous attachment to be made of the same property on a fictitious debt which they had created for the purpose of preventing attachments on bona fide debts. The suit upon which the fraudulent attachment was made was pursued to judgment, the property attached was sold on execution, and the proceeds of the sale remained in the hands of the

fraudulent judgment debtor. Now, by these collusive acts, the plaintiffs' attachment was defeated, and the price of the property, which, but for the fraudulent acts of the defendants, would have been applied to the satisfaction of the plaintiffs' execution, was holden by one of the defendants. Here the loss of the debt was the consequence of the loss of the lien, and the loss of the lien was the clear and certain consequence of the fraudulent conduct of the defendants. The injury was direct and certain, and the damages easily shown and defined. The justice of the plaintiffs' claim was very obvious, and their recovery founded on the soundest principles of law. Besides, if we were looking for distinctions between *Adams v. Paige* and the case at bar, it would be sufficient to state that the former was an action for a conspiracy between two, to defraud the plaintiffs by means of a fictitious debt and a collusive judgment, in which the unlawful confederacy was the gist of the action. In *Yates v. Joyce*, the plaintiff, by means of a judgment against his debtor, had, according to the laws of New York, acquired a lien on certain property, which was injured and reduced in value by the tortious acts of the defendant, so as to be insufficient to satisfy the plaintiff's judgment. The plaintiff suffered an injury for which he had no other remedy. The damage was definite and certain, and was the direct and necessary consequence of the defendant's tort. His right to recover was unquestionable. The old case of *Smith v. Tonstall*, Carth. 3, is very similar, and rests upon the same principle. The plaintiff having obtained a judgment against one S, the defendant procured S to confess a judgment to himself when nothing was due to him. This collusive judgment was satisfied by the sale of goods on which the plaintiff, by his prior judgment, had acquired a lien; thus placing in the defendant's hands the price of goods which were liable for the plaintiff's judgment. In all these cases the plaintiffs had a clear and valuable interest in or lien on certain property, which was defeated or destroyed by the tortious acts of the defendants. Not so in the case at bar. The plaintiff does not allege that he had any special property or any interest in or claim on any property which was destroyed or injured by any act of the defendant. And we are all of opinion that he has not set forth any such ground of action as can be sustained upon any known principles of law. *Vernon v. Keys*, 12 East, 632.

Judgment arrested.

(The doctrines established by this case are also upheld by the following decisions: *Bradley v. Fuller*, 118 Mass. 239; *Adler v. Fenton*, 24 How. 407, 16 L. Ed. 696; *Moody v. Burton*, 27 Me. 427, 46 Am. Dec. 612; *Hall v. Eaton*, 25 Vt. 458; *Klous v. Hennessey*, 13 R. I. 332; *Austin v. Barrows*, 41 Conn. 287; *Hurwitz v. Hurwitz*, 10 Misc. Rep. 353, 31 N. Y. Supp. 25.

As to the general rule that a violation of a right or duty, which is moral only and not legal, will not constitute a cause of action, see *Randall v. Hazelton*, 12 Allen, 412; *Hutchins v. Hutchins*, 7 Hill, 104; *Heywood v. Tillson*, 75 Me. 225, 46 Am. Rep. 373; remarks of Stephen, J., in *Alderson v. Maddison*, 5 Exch. Div., at page 296; remarks of Lord Herschell in *Derry v. Peek*, L. R. 14 App. Cas., at page 376.)

**Illustration of the establishment of legal rights by the common law, in the decision of "cases of novel impression."**

(150 N. Y. 176, 44 N. E. 773, 34 L. R. A. 156, 55 Am. St. Rep. 670.)

**KUJEK v. GOLDMAN et al.**

(Court of Appeals of New York. October 6, 1896.)

**DECEIT—WHEN ACTION LIES, THOUGH THERE IS NO PRECEDENT THEREFOR.**

An action lies against one who induced plaintiff to marry a woman by representing that she was virtuous, when she was at the time with child by defendant. The fact that there is no precedent for such an action does not preclude recovery.

Appeal from Common Pleas of New York City and County, General Term.

Action by Johann August Kujek against Manassah L. Goldman, impleaded with Katie Kujek. No answer was served by defendant Kujek, and no judgment was taken against her. From a judgment of the general term of the court of common pleas (9 Misc. Rep. 34, 29 N. Y. Supp. 294) affirming a judgment of the city court (5 Misc. Rep. 360, 25 N. Y. Supp. 753) affirming a judgment entered on a verdict against defendant Goldman, he appeals, by permission. Affirmed.

Prior to January 17, 1891, the defendant Katie Kujek, then named Katie Moritz, was an unmarried woman employed as a domestic in the family of the defendant Goldman, by whom she had become pregnant. Upon discovering the fact, the defendants, as it is alleged in the complaint, conspired to conceal their disgrace, and to induce the plaintiff to marry the said Katie, and to that end represented to him that she was a virtuous and respectable woman, and he, believing the same, did marry her on the day last named. The plaintiff, as it was further alleged, would not have contracted said marriage if he had known the facts. Subsequently, and on July 29, 1891, owing to such pregnancy, she gave birth to a child, of which said Goldman was the father. The answer of Goldman was, in substance, a general denial. No answer was served by the other defendant, and no judgment was taken against her. The evidence tended to sustain the allegations of the complaint.

VANN, J. (after stating the facts). The verdict of the jury has established as the facts of this case, beyond our power to review, that the plaintiff married Katie Moritz in the belief that she was a virtuous girl, induced by the representations of the defendant to that effect when in fact she was at the time pregnant by the defendant himself. The case was submitted to the jury upon the theory that if Goldman, knowing that Katie was unchaste, by false representations that she

was virtuous induced the plaintiff to marry her, he was entitled to recover damages, and the jury found a verdict in his favor for \$2,000. While no precedent is cited for such an action, it does not follow that there is no remedy for the wrong, because every form of action, when brought for the first time, must have been without a precedent to support it. Courts sometimes of necessity abandon their search for precedents, and yet sustain a recovery upon legal principles clearly applicable to the new state of facts, although there was no direct precedent for it, because there had never been an occasion to make one. In remote times, when actions were so carefully classified that a mistake in name was generally fatal to the case, a form of remedy was devised by the courts to cover new wrongs as they might occur, so as to prevent a failure of justice. This was called an "action on the case," which was employed where the right to sue resulted from the peculiar circumstances of the case, and for which the other forms of action gave no remedy. 26 Am. & Eng. Enc. Law, 694. For instance, the action for enticing away a man's wife, now well established, was at first earnestly resisted upon the ground that no such action had ever been brought. In an early case the court answered this position by saying: "The first general objection is that there is no precedent of any such action as this, and that, therefore, it will not lie; and the objection is founded on Litt. § 108, and Co. Litt. 81b, and several other books. But this general rule is not applicable to the present case. It would be if there had been no special action on the case before. A special action on the case was introduced for this reason: that the law will never suffer an injury and a damage without a remedy, but there must be new facts in every special action on the case." *Winsmore v. Greenbank*, Willes, 577, 580. As was recently said by this court in an action then without precedent, "If the most that can be said is that the case is novel, and is not brought plainly within the limits of some adjudged case, we think such fact not enough to call for a reversal of the judgment." *Piper v. Hoard*, 107 N. Y. 73, 76, 13 N. E. 626, 629, 1 Am. St. Rep. 789. The question therefore is not whether there is any precedent for the action, but whether the defendant inflicted such a wrong upon the plaintiff as resulted in lawful damages. The defendant by deceit induced the plaintiff to enter into a marriage contract, whereby he assumed certain obligations, and became entitled to certain rights. Among the obligations assumed was the duty of supporting his wife in sickness and in health, and he discharged this obligation by expending money to fit up rooms for housekeeping, in keeping house with his wife, and caring for her during confinement, when she bore a child, not to him, but to the defendant. Among the rights acquired was the right to his wife's services, companionship, and society. By the fraudulent conduct of the defendant, he was not only compelled to expend money to support a woman whom he would not otherwise have married, but was also deprived of her services while she was in childbed. He thus sustained actual damages to some extent; and as the wrong in-

volved not only malice, but moral turpitude also, in accordance with the analogies of the law upon the subject the jury had the right to make the damages exemplary. By thus applying well-settled principles upon which somewhat similar actions are founded, this action can be sustained, because there was a wrongful act in the fraud, that was followed by lawful damages, in the loss of money and services. The fact that the corruption of the plaintiff's wife was before he married her does not affect the right of action, as the wrong done to him was not by her defilement, but by the representation of the defendant that she was pure when he knew that she was impure, in order to bring about the marriage. It is difficult to see why a fraud which, if practiced with reference to a contract relating to property merely, would support an action, should not be given the same effect when it involves a contract affecting, not only property rights, but also the most sacred relation of life. Fraudulent representations with reference to the amount of property belonging to either party to a proposed marriage, made by a third person for the purpose of bringing about the marriage, are held to constitute an actionable wrong, and the usual remedy is to require the person guilty of the fraud to make his representations good. *Piper v. Hoard*, *supra*; *Montefiori v. Montefiori*, 1 W. Bl. 363; *Ath. Mar. Sett.* 484. In such cases the injury is more tangible, and the measure of damages more readily applied, than in the case before us; but both rest upon the principle that he who by falsehood and fraud induces a man to marry a woman is guilty of a wrong that may be remedied by an action, the amount of damages to be recovered depending upon the circumstances of the particular case.

We have thus far considered the right of action as resting upon some pecuniary loss, which, although trifling in amount, may be recovered as a matter of right, leaving it to the jury, in their sound discretion, as in a case for the seduction of a child or servant, to amplify the damages by way of punishment and example. We think, however, that the action can be maintained upon a broader and more satisfactory ground, and that is the loss of consortium, or the right of the husband to the conjugal fellowship and society of his wife. The loss of consortium through the misconduct of a third person has long been held an actionable injury, without proof of any pecuniary loss. *Bennett v. Bennett*, 116 N. Y. 584, 23 N. E. 17, 6 L. R. A. 553; *Hutcherson v. Peck*, 5 Johns. 196; *Hermance v. James*, 32 How. Prac. 142. As has been well said by a recent writer: "To entice away, or corrupt the mind and affection of, one's consort, is a civil wrong, for which the offender is liable to the injured husband or wife. The gist of the action is not in the loss of assistance, but the loss of consortium of the wife or husband, under which term are usually included the person's affection, society, or aid." *Bigelow, Torts*, 153. The damages are caused by the wrongful deprivation of that to which the husband or wife is entitled by virtue of the marriage contract. They rest upon the loss of a right which the marriage relation gives, and

of which it is an essential feature. Whether that right is wrongfully taken away after it is acquired, or the person entitled to it is wrongfully prevented from acquiring it, does not change the effect or lessen the injury. While the plaintiff has not been actually deprived of the society of his wife, he has been deprived of that which made her society of any value, the same as if she had been seduced after marriage. Although the formal right to consortium may remain, the substance has been taken away. In other words, when he entered into the marriage relation he was entitled to the company of a virtuous woman, yet through the fraud of the defendant that right never came to him. He has never enjoyed the chief benefit springing from the contract of marriage, which is the comfort, founded upon affection and respect, derived from conjugal society. If the defendant had deprived the plaintiff of his right to consortium after marriage, the law would have afforded a remedy by the award of damages. Yet the plaintiff, through the fault of the defendant, has suffered a loss of the same nature and to the same extent, except that, instead of losing what he once had, he has been prevented from getting it when he was entitled to it. This is a difference in form only, and is without substantial foundation. The injury, although effected by fraud before marriage, instead of by seduction after marriage, was the same, and why should not the remedy be the same? While the method of inflicting the injury is not the same, as it is tortious in character, has substantially the same effect, and causes damages of the same nature and to the same extent, why should damages be recovered in the one case if not in the other? Where false representations are willfully made as to a material fact, for the purpose of inducing another to act upon them, and he does so act to his injury, he may recover such damages as proximately result from the deception. The representations in this case, as the jury has found, were made to promote the marriage, and they were false, as the defendant well knew. They were clearly material. The plaintiff acted upon them, and was thereby injured; for he made a contract entitling him to certain rights, which he has not received, and which the defendant knew he could never receive. Here are all the elements of a good cause of action founded upon fraud resulting in damage. The contract induced by the fraud was of a peculiar nature, but it was in law simply a contract, conferring certain rights, and imposing certain obligations. While it is not agreeable to treat a subject of sacred importance upon this narrow basis, it is necessary to do so, for our law considers marriage in no other light than as a civil contract. If the defendant had induced the plaintiff to enter into any other contract by making false statements of fact, which if true would have made the contract more valuable, he would have been liable for all the damages that naturally resulted. If he had induced the very marriage contract under consideration by representing to the plaintiff that he owed his proposed wife a certain sum of money, according to the common law, which entitles the husband to the personal property of his wife, he could

have been compelled to make his representations good by the payment of that sum. *Montefiori v. Montefiori*, *supra*; *Redman v. Redman*, 1 Vern. 348; *Neville v. Wilkinson*, 1 Brown, Ch. Cas. 543; *Scott v. Scott*, 1 Cox, 378. These cases, as well as the more important case of *Piper v. Hoard*, *supra*, rest upon the principle that fraudulent representations as to the pecuniary condition of one party to a proposed marriage, made by a third person to the other party thereto, in order to promote the marriage, are actionable, and authorize the recovery of such damages as may be proved. In this case we have a representation that did not relate to property directly, although it involved rights in the nature of property, but did relate to character, and so vitally that its falsity was destructive of all happiness belonging to the plaintiff by virtue of his marriage. The injury was not merely sentimental, for, as has been shown, it extended to a right which the law recognizes as of pecuniary value, and for the wrongful destruction of which it awards damages. We think that the facts found warrant the recovery, and, after examining all the exceptions, are of the opinion that the judgment should be affirmed, with costs. All concur, except BARTLETT, J., not voting.

Judgment affirmed.

(For other interesting cases "of a novel impression," see *Cleary v. Booth*, [1893] 1 Q. B. 465; *Western Counties Manure Co. v. Lawes Chemical Manure Co.*, L. R. 9 Ex. 218; *Randlette v. Judkins*, 77 Me. 114, 52 Am. Rep. 747; *Lamb v. Stone*, 11 Pick. 527; *Winterbottom v. Wright*, 10 M. & W. 109. These last two cases are reported *infra*, pages 15, 151.)

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(121 Mass. 393, 23 Am. Rep. 279.)

RICE v. COOLIDGE et al. (in part).

(Supreme Judicial Court of Massachusetts. December 1, 1876.)

**DEFAMATION—SUBORNATION OF PERJURY—ACTION WITHOUT PRECEDENT.**

One who suborns witnesses to swear falsely to defamatory statements concerning another, *in a suit to which neither of them is a party*, is liable to an action by the person whose character is so defamed. That the perjured witness is protected by his personal privilege from a civil suit does not exempt the person who suborns him, they being joint tort-feasors. Nor is the novelty of such an action a valid objection thereto.

Demurrer to declaration, Suffolk County.

Action by Sarah M. Rice against John T. Coolidge and others. Defendants demurred to plaintiff's declaration.

MORTON, J. This is an action of tort. The principal question raised by the demurrer is whether the plaintiff's declaration states any legal cause of action. Each count alleges, in substance, that a proceeding for divorce was pending in the courts of the state of Iowa between Joseph S. Coolidge and Mary L. Coolidge, in which the latter

alleged that the said Joseph S. Coolidge had been guilty of adultery with the plaintiff; that the defendants conspired together and with the said Mary L. Coolidge to procure and suborn witnesses to falsely testify in support of said charges of adultery; and that the defendants, in pursuance and execution of said conspiracy, did procure and suborn certain witnesses named, to testify in said divorce suit, and to falsely swear to criminal sexual intercourse between the plaintiff and said Joseph S. Coolidge, and between the plaintiff and other persons, and to various other acts and things which, if believed, would tend to bring disgrace and infamy upon the plaintiff. The question is presented, therefore, whether the plaintiff can maintain an action of tort, in the nature of the common-law action on the case, against the defendants for suborning witnesses to falsely swear to defamatory statements concerning the plaintiff in a suit in which neither of the parties to this suit was a party.

It requires no argument to show that the acts charged as done by the defendants, if proved, are a great wrong upon the plaintiff. It is a general rule of the common law that a man shall have a remedy for every injury. The plaintiff should have a remedy for the injury done to her by the defendants, unless there are some other rules of law, or some controlling considerations of public policy, which take the case out of this rule. The defendants contend that the witnesses who uttered the defamatory statements are protected from an action, because they were statements made in the course of judicial proceedings, and that, therefore, a person who procured and suborned them to make the statements is not liable to an action. It seems to be settled by the English authorities that judges, counsel, parties, and witnesses are absolutely exempted from liability to an action for defamatory words published in the course of judicial proceedings. *Henderson v. Broomhead*, 4 Hurl. & N. 569; *Revis v. Smith*, 18 C. B. 126; *Dawkins v. Rokeby*, L. R. 8 Q. B. 255, and cases cited; affirmed, L. R. 7 H. L. 744; *Seaman v. Netherclift*, 1 C. P. Div. 540. The same doctrine is generally held in the American courts, with the qualification, as to parties, counsel, and witnesses, that, in order to be privileged, their statements made in the course of an action must be pertinent and material to the case. *White v. Carroll*, 42 N. Y. 161, 1 Am. Rep. 503; *Smith v. Howard*, 28 Iowa, 51; *Barnes v. McCrate*, 32 Me. 442; *Kidder v. Parkhurst*, 3 Allen, 393; *Hoar v. Wood*, 3 Metc. (Mass.) 193. In the last-cited case, Chief Justice Shaw says: "We take the rule to be well settled by the authorities that words spoken in the course of judicial proceedings, though they are such as impute crime to another, and therefore, if spoken elsewhere, would import malice and be actionable in themselves, are not actionable, if they are applicable and pertinent to the subject of inquiry." We assume, therefore, for the purposes of this case, that the plaintiff cannot maintain an action against the witnesses in the suit in Iowa for their defamatory statements, though they were false. But it does not follow that she may not maintain an action against those who, with

malice and intent to injure her, procured and suborned those witnesses to testify falsely. The reasons why the testimony of witnesses is privileged are that it is given upon compulsion, and not voluntarily; and that, in order to promote the most thorough investigation in courts of justice, public policy requires that witnesses shall not be restrained by the fear of being vexed by actions at the instance of those who are dissatisfied with their testimony. But these reasons do not apply to a stranger to the suit, who procures and suborns false witnesses, and the rule should not be extended beyond those cases which are within its reasons.

The argument that an accessory cannot be held civilly liable for an act for which no remedy can be had against the principal is not satisfactory to our minds. The perjured witness and the one who suborns him are joint tort-feasors, acting in conspiracy or combination to injure the party defamed. The fact that one of them is protected from a civil suit by a personal privilege does not exempt the other joint tort-feasor from such suit. A similar argument was disregarded by the court in *Emery v. Hapgood*, 7 Gray, 55, 66 Amr. Dec. 459, where it was held that the defendant, who instigated and procured an officer to arrest the plaintiff upon a void warrant, was liable to an action of tort therefor, although the officer who served the warrant was protected from an action for reasons of public policy. The defendants rely upon the cases of *Bostwick v. Lewis*, 2 Day, 447, and *Smith v. Lewis*, 3 Johns. 157, 3 Am. Dec. 469. But those cases turn upon a principle which does not apply in the case at bar. The facts in those cases were as follows: Lewis brought an action in Connecticut against several defendants, in which he prevailed. Afterwards Bostwick, one of the defendants in the original action, brought an action in Connecticut against Lewis, for suborning a witness in that action; and Smith, another of the defendants, brought a similar action in New York. It was held in each case that the action could not be maintained, because, in the language of Mr. Justice Kent, it was "an attempt to overhaul the merits" of a former suit. The case of *Dunlap v. Glidden*, 31 Me. 435, 52 Am. Dec. 625, is to the same effect. Although the parties to a former action cannot retry its merits while a judgment therein is in force and unreversed, yet any person who was not a party to the action or in privity with a party may, in a collateral action, impeach the judgment and overhaul the merits of the former action. Those cases, therefore, are not decisive of the case at bar.

The defendants argue that an action of this nature ought not to be maintained, because the plaintiff therein might, by the testimony of a single witness, prove that a witness in another action had committed perjury. The rule of law that a man cannot be convicted of perjury upon the unaided testimony of one witness is a rule applicable only to criminal proceedings. The argument may go to show that the rule ought to be extended to civil cases in which perjury is charged against a witness, but it does not furnish a satisfactory rea-

son why a plaintiff should be altogether deprived of a remedy for an injury inflicted upon him.

It is also urged, as an argument against the maintenance of this action, that it is a novelty. The fact that an action is without a precedent would call upon the court to consider with care the question whether it is justified by correct principles of law; but, if this is found, it is without weight. In answer to the same argument, Lord Chief Justice Willes said: "A special action on the case was introduced for this reason, that the law will never suffer an injury and a damage without a remedy, but there must be new facts in every special action on the case." *Winsmore v. Greenbank*, Willes, 577. Upon a careful consideration of the case, we are of opinion that there are no rules of law and no reasons of public policy which deprive the plaintiff of her remedy for the wrong done her by the defendants by suborning witnesses to defame her character.

Demurrer overruled.

(It is well settled that, at common law, a party to an action, who has been cast in a judgment through the perjury of a witness who testified against him, cannot maintain a civil action against the witness for perjury, nor against the opposite party for suborning the perjury. *Verplanck v. Van Buren*, 76 N. Y., at page 259; *Young v. Leach*, 27 App. Div. 293, 50 N. Y. Supp. 670; *Garing v. Fraser*, 76 Me. 37; *Taylor v. Bidwell*, 65 Cal. 489, 4 Pac. 491; cf. *Bynoe v. Bank of England*, [1902] 1 K. B. 467. The reason why the opposing party is not liable is that an action against him would be "an attempt to re-examine the merits of a judgment in a collateral suit between the same parties. Reasons of public policy and uniform authority forbid the attacking and impeachment of a judgment in this way." *Stevens v. Rowe*, 59 N. H. 578, 47 Am. Rep. 231. The reason why the witness is not liable is that "public policy and the safe administration of justice require that witnesses be privileged against any restraint excepting that imposed by the penalty for perjury, and that the merits of the judgment cannot be re-examined by a trial of the witness's testimony in a suit against him." *Id.* Sometimes, however, by modern statutes, the above rule is changed, and an action will lie for perjury or subornation of perjury. *Landers v. Smith*, 78 Me. 212, 3 Atl. 463.)

## Illustration of the creation of legal rights or legal duties by statute.

(78 N. Y. 310, 34 Am. Rep. 536.)

WILLY v. MULLEDY (in part).

(Court of Appeals of New York. September 30, 1879.)

### 1. NEGLIGENCE—STATUTORY DUTY—FIRE—ESCAPES.

Laws N. Y. 1873, c. 863, tit. 13, § 36, which requires the owners of tenement-houses to provide them with fire-escapes, etc., imposes on such an owner an absolute duty for the benefit of his tenants, and he is liable for a breach of such duty causing damage to a tenant.

**2. SAME—CONTRIBUTORY NEGLIGENCE.**

That a tenant had taken rooms in such a house not provided with a fire-escape, and had occupied them for a few days previous to the fire causing the injury complained of by him, does not relieve the owner from liability therefor, where it is not shown that the tenant knew there was no fire-escape. He had the right to assume that the statutory duty had been performed, and owed no duty to the owner to make an examination to see whether it had been done.

**3. SAME—EVIDENCE.**

In such a case, on the question of the probability that an occupant of the house, whose death was caused by the fire, would have escaped had there been a fire-escape as required by the statute, it may be inferred from the construction of the house and the structure of fire-escapes where one would probably have been placed.

**4. SAME.**

And the facts that such person knew that there was a scuttle in the roof, had time after notice of the fire to reach it, and made efforts to escape, are sufficient to justify a jury in finding that such person tried to escape in that direction, and failed for want of a ladder to the scuttle, which the owner had not provided as required by the statute.

### Appeal from City Court of Brooklyn, General Term.

Action by Joseph Willy, as administrator, etc., of his wife, against Patrick Mulledy, for damages for the death of plaintiff's wife, alleged to have been caused by neglect on the part of defendant. Defendant appeals from a judgment of the general term affirming a judgment for plaintiff entered upon a verdict, and affirming an order denying a motion for a new trial.

**EARL, J.** This is an action to recover damages for the death of plaintiff's wife, alleged to have been caused by the fault of the defendant. Prior to the 1st day of November, 1877, the plaintiff hired of the defendant certain apartments in the rear of the third story of a tenement-house in the city of Brooklyn, and with his wife and infant child moved into them, on that day. On the 5th day of the same month, in the day-time, a fire took place, originating in the lower story of the house, and plaintiff's wife and child were smothered to death.

It is claimed that the defendant was in fault because he had not constructed for the house a fire-escape, and because he had not placed in the house a ladder for access to the scuttle. Section 36, tit. 13, c. 863, Laws 1873, provides that every building in the city of Brooklyn shall have a scuttle or place of egress in the roof thereof of proper size; and "shall have ladders or stairways leading to the same; and all such scuttles and stairways or ladders leading to the roof shall be kept in readiness for use at all times." It also provided that houses like that occupied by the plaintiff "shall be provided with such fire-escapes and doors as shall be directed and approved by the commissioners [of the department of fire and buildings;] and the owner or owners of any building upon which any fire-escapes may now or hereafter be erected shall keep the same in good repair, and well painted, and no person shall at any time place any incumbrance of any kind

whatsoever upon said fire-escapes now erected, or that may hereafter be erected, in the city. Any person, after being notified by said commissioners, who shall neglect to place upon any such building the fire-escape herein provided for, shall forfeit the sum of \$500, and shall be deemed guilty of a misdemeanor." Under this statute the defendant was bound to provide this house with a fire-escape. He was not permitted to wait until he should be directed to provide one by the commissioners. He was bound to do it in such way as they should direct and approve, and it was for him to procure their direction and approval. No penalty is imposed for the simple omission to provide one. The penalty can be incurred only for the neglect to provide one after notification by the commissioners. Here was, then, an absolute duty imposed upon the defendant by statute to provide a fire-escape, and the duty was imposed for the sole benefit of the tenants of the house, so that they would have a mode of escape in the case of a fire. For a breach of this duty causing damage, it cannot be doubted that the tenants have a remedy. It is a general rule that whenever one owes another a duty, whether such duty be imposed by voluntary contract or by statute, a breach of such duty causing damage gives a cause of action. Duty and right are correlative, and where a duty is imposed there must be a right to have it performed. When a statute imposes a duty upon a public officer, it is well settled that any person having a special interest in the performance thereof may sue for a breach thereof causing him damage, and the same is true of a duty imposed by statute upon any citizen. *Cooley, Torts*, 654; *Hover v. Barkhoof*, 44 N. Y. 113; *Jetter v. Railroad Co.*, 2 Abb. Dec. 458; *Heeney v. Sprague*, 11 R. I. 456, 23 Am. Rep. 502; *Couch v. Steel*, 3 El. & Bl. 402. In *Comyn's Digest*, "Action upon Statute," F, it is laid down as the rule that, "in every case where a statute enacts or prohibits a thing for the benefit of a person, he shall have a remedy upon the same statute for the thing enacted for his advantage, or for the recompense of a wrong done to him contrary to the said law." There was no fire-escape for this house. But the claim is made on behalf of this defendant that he is not liable in this action, because the plaintiff and his wife knew, when they moved into the house and while they occupied the same, that there was no fire-escape, and hence that they voluntarily took the hazard of its absence. It is undoubtedly true that the plaintiff could have stipulated against or have waived the performance of this duty imposed for his benefit, but this he did not do. There is no proof of any kind that it was the intention of the parties entering into their contract that he should take and occupy this house without a fire-escape. There is nothing to show that he knew there was no fire-escape there when he hired the apartments. It is not shown that his attention was in any way called to the matter or that he looked for one. Its absence could be discovered only by an examination outside of the house, and there is no evidence that he made such examination. He had the right to assume that the statutory duty had been performed. There is no proof that during his

occupancy he discovered the absence of a fire-escape. He was there but three days, excluding the day upon which he moved in and the day upon which the fire occurred, and during that time it does not appear how much of the time he was in the house. There is certainly no evidence that he or his wife discovered that there was no fire-escape, or that their attention had been called to the matter. They owed no duty to the defendant to look and see whether there was one there or not. They had the right to rely upon its presence there as required by the statute. But suppose they did discover that there was no fire-escape at some time while there, after they moved in, does such discovery absolve the defendant from his duty? After making the discovery, they were not bound at once to leave the house and go into the street. They had a reasonable time to look for and move into other apartments; and by remaining for such reasonable time they waived nothing; and, if they did not choose to move out, they were entitled to a reasonable time to find the defendant and to call upon him to furnish the fire-escape. By remaining in the house for such reasonable time after discovery of the breach of duty on the part of the defendant, it could not be said as matter of law that they waived the performance thereof, or took upon themselves voluntarily the hazard of all the damages which they might sustain by the non-performance thereof. The duty rested upon the defendant not solely to have a fire-escape there when the plaintiff leased the premises, but it continued to rest upon him; and, before it could be held that the plaintiff absolved him in any way from this duty, the proof should be clear and satisfactory. Here, I hold, there was no proof whatever from which it could properly have been found that he did so absolve him.

But it was needful for the plaintiff to show, not only that there was this breach of duty, but that the death of plaintiff's wife was due to such breach; that is, that her life would have been saved if there had been a fire-escape there. It is reasonably certain that if the defendant had placed the fire-escape at the rear of the house, constructed as they were required to be, that the deceased would have seen it, and made her escape, as it would have been at one of the windows of the rear rooms which she occupied. But it is said that the defendant was not bound to place the fire-escape at the rear of his house, but that he could have placed it in the front of his house, and that if he had placed it there she could not have escaped. It is probably true that she could not have escaped from the front of the house. But there is no proof where fire-escapes are usually constructed, nor whether the front or rear of this particular house would have been the more suitable place for the fire-escape. I think we may assume from the manner in which the front part of this house was constructed, and from the structure of fire-escapes, that it is most probable that it would have been placed on the rear of the house. We think upon the whole case there was enough to authorize the jury to find that the deceased would have escaped, if the defendant had discharged his duty as the law required.

Many of the observations already made apply to the ladder for the scuttle. The duty to furnish and keep such a ladder was imposed mainly for the benefit of the tenants. It was the intention of the statute that they should have two means of escape in the case of fire, one by the scuttle and another by the fire-escape. It was the duty of the defendant to provide a ladder, and then to use reasonable care to keep it there in readiness for use. The defendant had once provided a ladder for this scuttle, but for many months before this fire there had been none there. This the plaintiff and his wife did not know. They knew where the scuttle was, and they had the right to suppose that there was a ladder to reach it, as the law requires. Hence there was, or at least the jury had the right to find that there was, a breach of duty in this respect. But the claim is also made as to this that there was not sufficient evidence to authorize the jury to find that the breach of this duty had any connection with the death of plaintiff's wife; that her life would have been saved if the ladder had been there. We think there was. The evidence was not very satisfactory. It is true that much is left, from the necessity of the case, to the weighing of probabilities. But the jury could find that the deceased knew where the scuttle was; that she had time after notice of the fire to reach it; and that, as she was making efforts to escape, she probably tried to escape in that direction, and failed for want of the ladder. There was sufficient evidence, therefore, to authorize a verdict for the plaintiff, and we do not think the judgment should be reversed for other errors alleged.

The judgment must be affirmed, with costs. All concur.

Judgment affirmed.

(Statutes, which, as in the above case, prescribe or prohibit certain acts, and declare a penalty for their violation, may be so drawn as to create, expressly or impliedly, a duty towards the public only, and not towards individuals. In such cases the penalty can be enforced for the public wrong, but if an individual also suffers damage from the violation of the statute, he cannot maintain an action against the wrongdoer to obtain redress therefor. *Heeney v. Sprague*, 11 R. I. 456, 23 Am. Rep. 502; *City of Rochester v. Campbell*, 123 N. Y. 405, 25 N. E. 937, 10 L. R. A. 393, 20 Am. St. Rep. 760; *Flynn v. Canton Co.*, 40 Md. 312, 17 Am. Rep. 603; *Atkinson v. Newcastle Waterworks Co.*, L. R. 2 Ex. D. 441; cf. *Borough of Bathurst v. Macpherson*, L. R. 4 App. Cas. 256, 268; *Pickering v. James*, L. R. 8 C. P. 489; *Grant v. Slater Mill Co.*, 14 R. I. 380. But when, as in *Willy v. Mulledy*, ante 28, the statutory obligation is construed as for the benefit of individuals, as well as of the public, the appropriate private remedy, as, e. g., an action for damages, is maintainable by the person injured. *Baxter v. Doe*, 148 Mass. 558, 8 N. E. 415; *Parker v. Barnard*, 135 Mass. 116, 46 Am. Rep. 450; *Taylor v. Lake Shore R. Co.*, 45 Mich. 74, 7 N. W. 728, 40 Am. Rep. 457; *Hayes v. Mich. Cent. R. Co.*, 111 U. S. 239, 240, 4 Sup. Ct. 369, 28 L. Ed. 410; *Bott v. Pratt*, 33 Minn. 323, 23 N. W. 237, 53 Am. Rep. 47; cf. *Donnegan v. Erhardt*, 119 N. Y. 468, 23 N. E. 1051, 7 L. R. A. 527; *Atchison, etc., R. Co. v. Reesman*, 60 Fed. 370, 9 C. C. A. 20, 23 L. R. A. 768; *Smith v. Tripp*, 13 R. I. 152.)

(46 Me. 95.)

STEARNS et al. v. ATLANTIC &amp; ST. L. R. CO. (In part).

(Supreme Judicial Court of Maine. 1858.)

**STATUTE CREATING A LEGAL RIGHT, BUT FAILING TO PROVIDE A REMEDY OR FORM OF ACTION FOR ITS VIOLATION.**

Pub. Laws 1842, c. 9, § 5, providing that a railroad corporation shall be held responsible to the owner of property that has been injured by fire communicated by a locomotive engine of the corporation, will not be held to be unavailing to the person whose property has been thus injured because neither that nor any other statute provides a remedy or prescribes a form of action. When a statute gives a right, or forbids the doing of an injury to another, and no action is given therefor in express terms, still the party shall have an action therefor.

Exceptions from the ruling of HATHAWAY, J.

This was an action to recover for the destruction of plaintiffs' building and other property by fire alleged to have been caused by a locomotive engine of defendants.

This action was brought under the fifth section of chapter 9 of the Public Laws of 1842, which provides that, "when any injury is done to a building or other property of any person or corporation, by fire communicated by a locomotive engine of any railroad corporation, the said corporation shall be held responsible in damages to the person or corporation so injured; and any railroad corporation shall have an insurable interest in the property for which it may be held responsible in damages, along its route, and may procure insurance in its own behalf."

The verdict was for the plaintiffs.

MAY, J. The first objection is that this action cannot be maintained because no remedy is given by the statute creating the liability, nor by any other statute, nor by the common law. That the statute, upon which the plaintiffs base their right to recover, gives to them a right to compensation for the injury they have sustained is not denied (Pub. Laws 1842, c. 9, § 5); but it is insisted that the creation of such a right is wholly unavailing to the party injured, unless the same statute, or some other, also provide some form of remedy. But such is not the law. Some form of action may always be maintained for a violation of a common-law right, and it is often said to be the pride of the common law that it furnishes a remedy for every wrong. In the absence of any authority to the contrary, it is not perceived why a legal right to compensation for actual damages sustained, even though such right depend wholly upon a statute, is not as worthy of protection in a court of law as any common-law right. The common law is said to be, in fact, nothing but the expression of ancient statutes; but, whether this be so or not, the injury for a violation of a statute right is as real as are injuries which exist only by the common law:

If a man has a right, he must, as has been observed in a celebrated case, have a means to vindicate and maintain it, and a remedy, if he is injured in the exercise and enjoyment of it; and, indeed, it is a vain thing to imagine a right without a remedy, for want of right and want of remedy are reciprocal. *Ashby v. White*, 2 Lord Raym. 953; *Westmore v. Greenbank*, Willes, 577, cited in *Broom's Maxims*, 147. To deny the remedy is, therefore, in substance, to deny the right; and it makes no difference whether the right exists at common law or by statute. Hence the familiar maxim quoted by the counsel in defense, that "wherever the statute gives a right the party shall, by consequence, have an action to recover it." The authorities cited in defense will be found to be in harmony with this maxim. The rule is now understood to be well settled that when a statute gives a right or forbids the doing of an injury to another, and no action be given therefor in express terms, still the party shall have an action therefor. *Broom's Maxims*, 149, 150, and cases there cited. The cases cited for the plaintiffs not only sustain the same position, but also show that where no other remedy is provided the proper remedy is a special action on the case.

It is said, however, that in all these cases the fact that a wrong had been done is recognized by the court, while in the case at bar the defendants are without fault. This may be true, if the defendants or their lessees are required in the running of their engines to exercise only that degree of care which is required by the common law. But something more than ordinary care, at least by a strong implication, is made necessary by the statute on which this action is founded. In the rightful exercise of its powers the Legislature has determined that if the locomotive engines of any railroad corporation are driven by them or their agents in such a manner, or under such circumstances, that fire shall be communicated thereby to the property of any person or corporation along its route, such railroad corporation shall be held responsible in damages to the person or corporation injured. The degree of care, therefore, which is required to protect such railroad corporation against liability for damages occasioned by fire so communicated is such as will prevent all such injury. If they exercise such care they are safe; otherwise they are not. We cannot say, considering the dangerous nature of this element, and the vast amount of property along our railroad routes which is exposed to its devouring flames, that such a rule is not required for the public good, or that when a less degree is exercised, even though it be all which ordinary prudence might require, the corporation is without legal fault. There is at least a statute wrong. The foundation, therefore, for the alleged distinction between this case and those referred to in the cases cited does not exist, and the exception to the ruling of the presiding judge on this point is not sustained.

Exceptions overruled, and judgment on the verdict.

(The rule laid down in the above case has been otherwise expressed as follows: "When a statute gives a right, then, although in express terms it has

not given a remedy, the remedy which by law is properly applicable to that right follows as an incident." *Braithwaite v. Skinner*, 5 M. & W. 327. American cases in support of this rule are *Rackliff v. Greenbush*, 98 Me. 104, 44 Atl. 375; *Brown v. City of Lowell*, 8 Metc., at page 177; *Tapley v. Forbes*, 2 Allen, at page 24; *Healey v. New Haven*, 49 Conn. 394; *Clark v. Brown*, 18 Wend., at page 220; *Dudley v. Mayhew*, 3 N. Y. 9; *Commrs. v. Duckett*, 20 Md. 468; *McCarthy v. St. Paul*, 22 Minn. 527; *Dore v. Milwaukee*, 42 Wis. 108; *Reock v. Mayor of Newark*, 33 N. J. Law, 129; *Householder v. Kansas City*, 83 Mo. 488.)

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(5 Johns. 175.)

ALMY v. HARRIS.

(Supreme Court of New York. 1809.)

1. FERRIES—INFRINGEMENT OF RIGHTS—ACTION—PENALTIES.

A person having a right of ferry, granted under the act to regulate ferries within this state, cannot maintain an action on the case for the disturbance of his right. His only remedy is for the penalty given by the statute.

2. STATUTES—COMMON LAW—ACTION.

If a statute gives a remedy in the affirmative, without a negative express or implied, for a matter which was actionable at the common law, the party may sue at the common law as well as upon the statute.

On Certiorari from a Justice's Court.

Harris sued Almy in the court below, in an action on the case, for disturbing him in the enjoyment of a ferry across the Cayuga Lake, at the village of Cayuga, granted to Harris, by the courts of common pleas, for the counties of Cayuga and Seneca. A judgment for damages was given in favor of Harris, on which the certiorari was brought to this court. Several errors were assigned, but it will be sufficient to state the opinion of the court.

PER CURIAM. There is one error which we consider fatal, and for that we think there must be a judgment of reversal. The act to regulate ferries within this state (20 Sess. c. 64, § 1) prohibits any person, except within the southern district, the counties of Orange and Clinton, from keeping or using a ferry for transporting across any river, stream, or lake, any person or persons, or any goods or merchandise, for profit or hire, unless licensed in the manner directed by that act, under a penalty of \$5.

If Harris had possessed a right at the common law to the exclusive enjoyment of this ferry, then, the statute giving a remedy in the affirmative, without a negative expressed or implied, for a matter authorized by the common law, he might, notwithstanding the statute, have his remedy by action at the common law. 1 Com. Dig. Action on Statute, (C). But Harris had no exclusive right at the common law, nor any right but what he derived from the statute. Consequently he can have no right, since the statute, but those it gives;

and his remedy, therefore, must be under the statute, and the penalty only can be recovered.

**Judgment reversed.**

(These rules are well settled. Thus (1) the rule that "if a statute creates a right which did not exist before, and prescribes a remedy for the violation of it, this remedy only can be pursued," is supported by *Stafford v. Ingersol*, 3 Hill, 38; *People v. Bd. of Canvassers*, 156 N. Y., at page 59, 50 N. E. 432, and cases cited; *Coffin v. Field*, 7 Cush. 355, 358; *Henniker v. Contoocook R. R.*, 29 N. H. 146; *Lease v. Vance*, 28 Iowa, 509; *Bassett v. Carleton*, 32 Me. 553, 54 Am. Dec. 605; *City of Camden v. Allen*, 26 N. J. Law, 398, 403; cf. *Fletcher v. State Capital Bank*, 37 N. H. 369, 391; *Learock v. Putnam*, 111 Mass. 499. And (2) the rule that "where there was a remedy at common law, and a statute gives a new remedy, without a negative express or implied, the old remedy is not taken away, but a party injured may elect between the two," is supported by *Tremain v. Richardson*, 68 N. Y. 617; *People v. N. Y. Cent. R. Co.*, 74 N. Y. 302; *Gooch v. Stephenson*, 13 Me. 371; *Barden v. Crocker*, 10 Pick. 383, 389; *Adams v. Richardson*, 43 N. H. 212; *King v. Pomeroy*, 121 Fed. 287, 292; *Bellant v. Brown*, 78 Mich. 294, 44 N. W. 326.)

## **Injuria sine damno gives a right of action.**

(3 Sumn. 189, Fed. Cas. No. 17,322.)

**WEBB v. PORTLAND MANUF'G CO.** (In part).

(U. S. Circuit Court, D. Maine. May Term, 1838.)

### **1. VIOLATION OF RIGHT WITHOUT ACTUAL DAMAGE.**

To sustain an action, where there is a clear violation of a legal right, it is not necessary to show actual damage; every such violation imports damage; and plaintiff is entitled to nominal damages, if no other be proved. A fortiori this doctrine applies when the act done is such that, by its repetition or continuance, it may become the foundation or evidence of an adverse right; and, in such a case, a court of equity will interpose by injunction to restrain such injurious act, when the remedy at law is inadequate to prevent and redress the mischief.

### **2. DIVERSION OF WATER-COURSE—INJUNCTION.**

Plaintiff and defendants severally owned different mills and mill privileges at the same mill-dam. Defendants drew water for the supply of one of their mills from the head of the mill-pond, and afterwards returned the water into the stream below the dam. The water so withdrawn was much less than the amount to which defendants were entitled at the dam. *Held*, that plaintiff was entitled, not merely to his proportion of the water in the pond, but to his proportion of the whole stream at the dam, undivided and undiminished in its natural flow, and defendants should be restrained by injunction from the diversion, at the mill pond, of even a part thereof less than their proportion; and that it was no answer to plaintiff's bill therefor that defendants had improved the supply of water to the pond by a reservoir higher up the stream.

**In Equity. On bill for injunction.**

Bill in equity by Joshua Webb against the Portland Manufacturing Company to restrain the diversion of water from plaintiff's mill. On

the stream on which the mill was situated were two dams, the distance between which was about 40 or 50 rods, occupied by the mill-pond of the lower dam. Plaintiff owned certain mills and mill privileges on the lower dam. Defendants also owned certain other mills and mill privileges on the same dam. To supply water to one of such mills, defendants made a canal from the pond at a point immediately below the upper dam. The water thus withdrawn by them for that purpose was about one-fourth of the water to which defendants were entitled as mill-owners on the lower dam, and was returned into the stream immediately below that dam.

STORY, J. The question which has been argued upon the suggestion of the court is of vital importance in the cause, and, if decided in favor of the plaintiff, it supersedes many of the inquiries to which our attention must otherwise be directed. It is on this account that we thought it proper to be argued separately from the general merits of the cause.

The argument for the defendants, then, presents two distinct questions. The first is whether, to maintain the present suit, it is essential for the plaintiff to establish any actual damage. The second is whether, in point of law, a mill-owner, having a right to a certain portion of the water of a stream for the use of his mill at a particular dam, has a right to draw off the same portion or any less quantity of the water, at a considerable distance above the dam, without the consent of the owners of other mills on the same dam. In connection with these questions, the point will also incidentally arise whether it makes any difference that such drawing off of the water above can be shown to be no sensible injury to the other mill-owners on the lower dam.

As to the first question, I can very well understand that no action lies in a case where there is *damnum absque injuria*; that is, where there is a damage done without any wrong or violation of any right of the plaintiff. But I am not able to understand how it can correctly be said, in a legal sense, that an action will not lie, even in case of a wrong or violation of a right, unless it is followed by some perceptible damage, which can be established as a matter of fact; in other words, that *injuria sine damno* is not actionable. See *Mayor of Lynn, etc., v. Mayor of London*, 4 Term R. 130, 141, 143, 144; Com. Dig. "Action on the Case," B 1, 2. On the contrary, from my earliest reading, I have considered it laid up among the very elements of the common law that wherever there is a wrong there is a remedy to redress it; and that every injury imports damage in the nature of it; and, if no other damage is established, the party injured is entitled to a verdict for nominal damages. A fortiori this doctrine applies where there is not only a violation of a right of the plaintiff, but the act of the defendant, if continued, may become the foundation, by lapse of time, of an adverse right in the defendant; for then it assumes the character, not merely of a violation of a right tending to diminish its value, but

it goes to the absolute destruction and extinguishment of it. Under such circumstances, unless the party injured can protect his right from such a violation by an action, it is plain that it may be lost or destroyed, without any possible remedial redress. In my judgment, the common law countenances no such inconsistency, not to call it by a stronger name. Actual, perceptible damage is not indispensable as the foundation of an action. The law tolerates no further inquiry than whether there has been the violation of a right. If so, the party injured is entitled to maintain his action for nominal damages, in vindication of his right, if no other damages are fit and proper to remunerate him. So long ago as the great case of *Ashby v. White*, 2 Ld. Raym. 938, 6 Mod. 45, Holt, 524, the objection was put forth by some of the judges, and was answered by Lord Holt, with his usual ability and clear learning; and his judgment was supported by the house of lords, and that of his brethren overturned. By the favor of an eminent judge, Lord Holt's opinion, apparently copied from his own manuscript, has been recently printed. In this last printed opinion (page 14) Lord Holt says: "It is impossible to imagine any such thing as *injuria sine damno*. Every injury imports damage in the nature of it." S. P. 2 Ld. Raym. R. 955. And he cites many cases in support of his position. Among these is *Starling v. Turner*, 2 Lev. 50, 2 Vent. 25, where the plaintiff was a candidate for the office of bridge-master of London bridge, and the lord mayor refused his demand of a poll, and it was determined that the action was maintainable for the refusal of the poll. Although it might have been that the plaintiff would not have been elected, the action was nevertheless maintainable; for the refusal was a violation of the plaintiff's right to be a candidate. So, in *Hunt v. Dowman*, Cro. Jac. 478, 2 Rolle, 21, where the lessor brought an action against the lessee for disturbing him from entering into the house leased, in order to view it, and to see whether any waste was committed; and it was held that the action well lay, though no waste was committed and no actual damage done, for the lessor had a right so to enter, and the hindering of him was an injury to that right, for which he might maintain an action. So *Herring v. Finch*, 2 Lev. 250, where it was held that a person entitled to vote, who was refused his vote at an election, might well maintain an action therefor, although the candidate, for whom he might have voted, might not have been chosen, and the voter could not sustain any perceptible or actual damage by such refusal of his vote. The law gives the remedy in such case, for there is a clear violation of the right. And this doctrine, as to a violation of the right to vote, is now incontrovertibly established; and yet it would be impracticable to show any temporal or actual damage thereby. See *Harman v. Tappenden*, 1 East, 555; *Drewe v. Coulton*, Id. 563, note; *Kilham v. Ward*, 2 Mass. 236; *Lincoln v. Hapgood*, 11 Mass. 350; 2 Vin. Abr. "Action, Case," note c, pl. 3. In the case of *Ashby v. White*, as reported by Lord Raymond, (2 Ld. Raym. 953,) Lord Holt said: "If the plaintiff has a right, he must of necessity have a means to vindicate and maintain it, and a

remedy, if he is injured in the exercise or enjoyment of it; and, indeed, it is a vain thing to imagine a right without a remedy; for want of right and want of remedy are reciprocal." S. P. 6 Mod. 53.

The principles laid down by Lord Holt are so strongly commended, not only by authority, but by the common sense and common justice of mankind, that they seem absolutely, in a judicial view, incontrovertible. And they have been fully recognized in many other cases. The note of Mr. Sergeant Williams to *Mellor v. Spateman*, 1 Saund. 346a, note 2; *Wells v. Watling*, 2 W. Bl. 1233; and the case of the *Tunbridge Dippers*, (*Weller v. Baker*), 2 Wils. 414,—are direct to the purpose. I am aware that some of the old cases inculcate a different doctrine, and perhaps are not reconcilable with that of Lord Holt. There are also some modern cases which at first view seem to the contrary. But they are distinguishable from that now in judgment.

On the other hand, *Marzetti v. Williams*, 1 Barn. & Adol. 415, goes the whole length of Lord Holt's doctrine; for there the plaintiff recovered, notwithstanding no actual damage was proved at the trial; and Mr. Justice Taunton on that occasion cited many authorities to show that where a wrong is done, by which the right of the party may be injured, it is a good cause of action, although no actual damage be sustained.

The case of *Bower v. Hill*, 1 Bing. N. C. 549, fully sustains the doctrine for which I contend; and, indeed, a stronger case of its application cannot well be imagined. There the court held that a permanent obstruction to a navigable drain of the plaintiff's, though choked up with mud for 16 years, was actionable, although the plaintiff received no immediate damage thereby; for, if acquiesced in for 20 years, it would become evidence of a renunciation and abandonment of the right of way. The case of *Blanchard v. Baker*, 8 Greenl. 253, 268, 23 Am. Dec. 504, recognizes the same doctrine in the most full and satisfactory manner, and is directly in point; for it was a case for diverting water from the plaintiff's mill.

Upon the whole, without going further into an examination of the authorities on this subject, my judgment is that, whenever there is a clear violation of a right, it is not necessary in an action of this sort to show actual damage; that every violation imports damage; and, if no other be proved, the plaintiff is entitled to a verdict for nominal damages; and a fortiori that this doctrine applies whenever the act done is of such a nature as that by its repetition or continuance it may become the foundation or evidence of an adverse right. See, also, *Mason v. Hill*, 3 Barn. & Adol. 304, 5 Barn. & Adol. 1. But if the doctrine were otherwise, and no action were maintainable at law, without proof of actual damage, that would furnish no ground why a court of equity should not interfere, and protect such a right from violation and invasion; for, in a great variety of cases, the very ground of the interposition of a court of equity is that the injury done is irreparable at law, and that the right can only be permanently preserved or perpetuated by the powers of a court of equity. And one of the most

ordinary processes to accomplish this end is by a writ of injunction, the nature and efficacy of which for such purpose I need not state, as the elementary treatises fully expound them. See *Eden, Inj.*; 2 *Story, Eq. Jur. c. 23, §§ 86-959*; *Bolivar Manuf'g Co. v. Neponset Manuf'g Co.*, 16 *Pick. 241*. If, then, the diversion of water complained of in the present case is a violation of the right of the plaintiff, and may permanently injure that right, and become, by lapse of time, the foundation of an adverse right in the defendants, I know of no more fit case for the interposition of a court of equity, by way of injunction, to restrain the defendants from such an injurious act. If there be a remedy for the plaintiff at law for damages, still that remedy is inadequate to prevent and redress the mischief. If there be no such remedy at law, then, a fortiori, a court of equity ought to give its aid to vindicate and perpetuate the right of the plaintiff. A court of equity will not, indeed, entertain a bill for an injunction in case of a mere trespass fully remediable at law. But, if it might occasion irreparable mischief or permanent injury, or destroy a right, that is the appropriate case for such a bill. See 2 *Story, Eq. Jur. §§ 926-928*, and the cases there cited; *Jerome v. Ross*, 7 *John. Ch. 315*, 11 *Am. Dec. 484*; *Van Bergen v. Van Bergen*, 3 *John. Ch. 282*, 8 *Am. Dec. 511*; *Turnpike Road v. Miller*, 5 *John. Ch. 101*, 9 *Am. Dec. 274*; *Gardner v. Village of Newburgh*, 2 *John. Ch. 162*, 7 *Am. Dec. 526*.

Let us come, then, to the only remaining question in the cause, and that is whether any right of the plaintiff, as mill-owner on the lower dam, is or will be violated by the diversion of the water by the canal of the defendants. And here it does not seem to me that, upon the present state of the law, there is any real ground for controversy, although there were formerly many vexed questions, and much contrariety of opinion. The true doctrine is laid down in *Wright v. Howard*, 1 *Sim. & S. 190*, by Sir John Leach, in regard to riparian proprietors, and his opinion has since been deliberately adopted by the king's bench. *Mason v. Hill*, 3 *Barn. & Adol. 304*, 5 *Barn. & Adol. 1*. See, also, *Bealey v. Shaw*, 6 *East, 208*. "Prima facie," says that learned judge, "the proprietor of each bank of a stream is the proprietor of half the land covered by the stream; but there is no property in the water. Every proprietor has an equal right to use the water which flows in the stream; and consequently no proprietor can have the right to use the water to the prejudice of any other proprietor, without the consent of the other proprietors who may be affected by his operations. No proprietor can either diminish the quantity of water which would otherwise descend to the proprietors below, nor throw the water back upon the proprietors above. Every proprietor, who claims a right either to throw the water back above or to diminish the quantity of water which is to descend below, must, in order to maintain his claim, either prove an actual grant or license from the proprietors affected by his operations, or must prove an uninterrupted enjoyment of twenty years, which term of twenty years is now adopted upon a principle of general convenience, as affording conclusive presump-

tion of a grant." Mr. Chancellor Kent has also summed up the same doctrine, with his usual accuracy, in the brief but pregnant text of his Commentaries (3 Kent, Comm., 3d Ed., Lect. 42, p. 439); and I scarcely know where else it can be found reduced to so elegant and satisfactory a formulary. In the old books the doctrine is quaintly, though clearly, stated; for it is said that a water-course begins *ex jure naturæ*, and, having taken a certain course naturally, it cannot be [lawfully] diverted. *Aqua currit, et debet currere, ut currere solebat*. *Shury v. Piggot*, 3 Bulst. 339, Poph. 166.

The same principle applies to the owners of mills on a stream. They have an undoubted right to the flow of the water as it has been accustomed of right and naturally to flow to their respective mills. The proprietor above has no right to divert or unreasonably to retard this natural flow to the mills below; and no proprietor below has a right to retard or turn it back upon the mills above to the prejudice of the right of the proprietors thereof. This is clearly established by the authorities already cited: the only distinction between them being that the right of a riparian proprietor arises by mere operation of law as an incident to his ownership of the bank, and that of a mill-owner as an incident to his mill. *Bealey v. Shaw*, 6 East, 208; *Saunders v. Newman*, 1 Barn. & Ald. 258; *Mason v. Hill*, 3 Barn. & Adol. 304, 5 Barn. & Adol. 1; *Blanchard v. Baker*, 8 Greenl. 253, 268, 23 Am. Dec. 504; and *Tyler v. Wilkinson*, 4 Mason, 397, 400-405, Fed. Cas. No. 14,312—are fully in point. Mr. Chancellor Kent in his Commentaries relies on the same principles and fully supports them by a large survey of the authorities. 3 Kent, Comm. (3d Ed.) Lect. 52, pp. 441-445.

Now, if this be the law on this subject, upon what ground can the defendants insist upon a diversion of the natural stream from the plaintiff's mills, as it has been of right accustomed to flow thereto? First, it is said that there is no perceptible damage done to the plaintiff. That suggestion has been already in part answered. If it were true, it could not authorize a diversion, because it impairs the right of the plaintiff to the full, natural flow of the stream, and may become the foundation of an adverse right in the defendants. In such a case actual damage is not necessary to be established in proof. The law presumes it. The act imports damage to the right, if damage be necessary. Such a case is wholly distinguishable from a mere fugitive, temporary trespass, by diverting or withdrawing the water a short period without damage, and without any pretense of right. In such a case, the wrong, if there be no sensible damage, and it be transient in its nature and character, as it does not touch the right, may possibly (for I give no opinion upon such a case) be without redress at law; and certainly it would found no ground for the interposition of a court of equity by way of injunction.

But I confess myself wholly unable to comprehend how it can be assumed, in a case like the present, that there is not and cannot be an actual damage to the right of the plaintiff. What is that right? It is the right of having the water flow in its natural current at all times

of the year to the plaintiff's mills. Now, the value of the mill privileges must essentially depend, not merely upon the velocity of the stream, but upon the head of water which is permanently maintained. The necessary result of lowering the head of water permanently would seem, therefore, to be a direct diminution of the value of the privileges; and, if so, to that extent it must be an actual damage.

Again, it is said that the defendants are mill-owners on the lower dam, and are entitled, as such, to their proportion of the water of the stream in its natural flow. Certainly they are. But where are they so entitled to take and use it? At the lower dam; for there is the place where their right attaches, and not at any place higher up the stream. Suppose they are entitled to use for their own mills on the lower dam half the water which descends to it, what ground is there to say that they have a right to draw off that half at the head of the mill-pond? Suppose the head of water at the lower dam in ordinary times is two feet high, is it not obvious that, by withdrawing at the head of the pond one-half of the water, the water at the dam must be proportionally lowered? It makes no difference that the defendants insist upon drawing off only one-fourth of what they insist they are entitled to; for, pro tanto, it will operate in the same manner; and, if they have a right to draw off to the extent of one-fourth of their privilege, they have an equal right to draw off to the full extent of it. The privilege attached to the mills of the plaintiff is not the privilege of using half, or any other proportion merely, of the water in the stream, but of having the whole stream, undiminished in its natural flow, come to the lower dam with its full power, and there to use his full share of the water-power. The plaintiff has a title, not to a half or other proportion of the water in the pond, but is, if one may so say, entitled *per my et per tout* to his proportion of the whole bulk of the stream, undivided and indivisible, except at the lower dam. This doctrine, in my judgment, irresistibly follows from the general principles already stated; and, what alone would be decisive, it has the express sanction of the supreme court of Maine in the case of *Blanchard v. Baker*, 8 Greenl. 253, 270, 23 Am. Dec. 504. The court there said, in reply to the suggestion that the owners of the eastern shore had a right to half the water, and a right to divert it to that extent: "It has been seen that, if they had been owners of both sides, they had no right to divert the water without again returning it to its original channel, (before it passed the lands of another proprietor.) Besides, it was impossible, in the nature of things, that they could take it from their side only. An equal portion from the plaintiff's side must have been mingled with all that was diverted."

A suggestion has also been made that the defendants have fully indemnified the plaintiff from any injury, and in truth have conferred a benefit on him, by securing the water, by means of a raised dam, higher up the stream, at Sebago pond, in a reservoir, so as to be capable of affording a full supply in the stream in the driest seasons. To this suggestion several answers may be given. In the first place, the plain-

tiff is no party to the contract for raising the new dam, and has no interest therein, and cannot, as a matter of right, insist upon its being kept up, or upon any advantage to be derived therefrom. In the next place, the plaintiff is not compellable to exchange one right for another, or to part with a present interest in favor of the defendants at the mere election of the latter. Even a supposed benefit cannot be forced upon him against his will; and, certainly, there is no pretense to say that, in point of law, the defendants have any right to substitute, for a present existing right of the plaintiff's, any other which they may deem to be an equivalent. The private property of one man cannot be taken by another, simply because he can substitute an equivalent benefit.

Having made these remarks upon the points raised in the argument, the subject, at least so far as it is at present open for the consideration of the court, appears to me to be exhausted. Whether, consistently with this opinion, it is practicable for the defendants successfully to establish any substantial defense to the bill, it is for the defendants, and not for the court, to consider. I am authorized to say that the district judge concurs in this opinion.

Decree accordingly.

(To the same effect are the following cases: *N. Y. Rubber Co. v. Rothery*, 132 N. Y. 293, 30 N. E. 841, 28 Am. St. Rep. 575; *Amsterdam Knitting Co. v. Dean*, 162 N. Y. 278, 56 N. E. 757; *Parker v. Griswold*, 17 Conn. 288, 42 Am. Dec. 739 [a valuable decision]; *Clark v. Railroad Co.*, 145 Pa. 438, 22 Atl. 989, 27 Am. St. Rep. 710; *Lund v. New Bedford*, 121 Mass. 286; *Stowell v. Lincoln*, 11 Gray, 434; *Blodgett v. Stone*, 60 N. H. 167; *Embrey v. Owen*, 6 Exch. 353. In *Larned v. Wheeler*, 140 Mass. 390, 5 N. E. 290, 54 Am. Rep. 483, an action for damages was sustained against selectmen of a town for erasing a voter's name from the register of voters, whereby he was deprived of his right to vote. In *Harrington v. McCarthy*, 169 Mass. 492, 48 N. E. 278, 61 Am. St. Rep. 298, an action for an injunction was held maintainable where the cornice of defendant's building projected 18 inches over plaintiff's land, though the plaintiff had not suffered any actual damage therefrom in the use of his property.)

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(66 Mich. 370, 33 N. W. 521.)

**FISHER v. DOWLING** (in part).

(Supreme Court of Michigan. June 16, 1887.)

**TRESPASS—DAMAGES RECOVERABLE THOUGH ACT IMPROVES PROPERTY.**

In an action for trespass for sawing off the top of plaintiff's fence, plaintiff is entitled to recover the full value of the property destroyed, even though the fence was improved by defendant's act.

Error to Circuit Court, Oakland County.

CAMPBELL, C. J. Fisher sued Dowling in trespass for sawing off about a foot of the upper part of plaintiff's fence between him and defendant. No question was made concerning plaintiff's title to the

property which he occupied, and the real question was whether this fence was on the plaintiff's land as actually occupied by him. The proof was very positive on his part that the fence was entirely within the land occupied by him for a period of many years. Defendant introduced some testimony to the contrary. The question of possession was very fairly left to the jury, who found for the plaintiff.

But it is claimed the court erred in holding that for such a trespass there should be at least nominal damages, which are all that the jury awarded. Defendant's counsel insist that, if this cutting-down process improved the fence, there was not even a nominal wrong. This is a remarkable claim, and the verdict is a remarkable verdict. It was plaintiff's right to have a fence of such height as he adopted, and it is not the right of a neighbor to lower it. The jury ought to have rendered a verdict for the full value of the property destroyed. Judgment affirmed, with costs.

(The rule that the violation of a legal right affords a cause of action, even if defendant's act has benefited the plaintiff, is also upheld by *Murphy v. Fond du Lac*, 23 Wis. 365, 99 Am. Dec. 181; *Jones v. Hannovan*, 55 Mo. 462; *Parker v. Griswold*, 17 Conn. 288, 303, 42 Am. Dec. 739; *Seneca Road Co. v. Auburn, etc., R. Co.*, 5 Hill, 170, 176; cf. *Jewett v. Whitney*, 43 Me. 242.)

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## Ex damno sine injuria non oritur actio.

(122 Mass. 199, 23 Am. Rep. 312.)

GILMORE v. DRISCOLL (In part).

(Supreme Judicial Court of Massachusetts, Suffolk. 1876.)

### 1. LATERAL SUPPORT OF SOIL—REMOVAL—LIABILITY.

One who makes excavations of soil, causing the soil of a neighbor's adjoining tract to fall, is liable, even if there was no negligence on his part, for the injury done to the land in its natural condition. A landowner has the absolute right to have his land remain in its natural condition, unaffected by any act of his neighbor, and, if the neighbor digs upon or improves his own land, so as to injure this right, may maintain an action against him without proof of negligence.

### 2. SAME—INJURY TO IMPROVEMENTS.

One who makes excavations of soil is not liable, in the absence of negligence on his part, for injury thereby to artificial improvements, as buildings, fences, etc., on a neighbor's adjoining tract, unless the neighbor had acquired a right to the support of such improvements by grant or prescription. It seems that such a right cannot be gained in this country by prescription.

### 3. SAME—MEASURE OF DAMAGES.

The measure of damages for removal of the lateral support of the soil of one's tract of land, thereby causing the soil to fall, is the damage occasioned by loss of and injury to the soil alone, not the sum required to restore the soil to its former condition, or the difference in the market value of the tract.

**4. SAME—OWNERSHIP OF ADJOINING TRACT.**

That land in which one makes excavations does not belong to him does not affect his liability for injury resulting from the removal of the lateral support of the soil of an adjoining tract.

Action by Anne Gilmore against James Driscoll. From a judgment in favor of plaintiff, the defendant appeals, on an agreed statement of fact. Judgment for the plaintiff.

One Webb owned a tract of land adjoining a tract owned by the plaintiff. The defendant, with the permission of a licensee of Webb, made excavations in Webb's lot near the division line, causing the soil of plaintiff's lot to fall, taking with it a fence and shrubbery located thereon. The weight of structures on plaintiff's land did not contribute to the falling away of the soil. The damages occasioned to the plaintiff by loss of and injury to her soil alone amount to \$95. To put the soil in its former condition would cost \$575, and to replace the fence and shrubs would cost \$45. The difference in the market value of the land is equal to the sum of the last two amounts, or \$620.

GRAY, C. J. The right of an owner of land to the support of the land adjoining is *jure naturæ*, like the right in a flowing stream. Every owner of land is entitled, as against his neighbor, to have the earth stand and the water flow in its natural condition. In the case of running water, the owner of each estate by which it flows has only the right to the use of the water for reasonable purposes, qualified by a like right in every other owner of land above or below him on the same stream. But in the case of land, which is fixed in its place, each owner has the absolute right to have his land remain in its natural condition, unaffected by any act of his neighbor, and, if the neighbor digs upon or improves his own land so as to injure this right, may maintain an action against him without proof of negligence.

But this right of property is only in the land in its natural condition, and the damages in such an action are limited to the injury to the land itself, and do not include any injury to buildings or improvements thereon. While each owner may build upon and improve his own estate at his pleasure, provided he does not infringe upon the natural right of his neighbor, no one can by his own act enlarge the liability of his neighbor for an interference with this natural right. If a man is not content to enjoy his land in its natural condition, but wishes to build upon or improve it, he must either make an agreement with his neighbor, or dig his foundations so deep, or take such other precautions, as to insure the stability of his buildings or improvements, whatever excavations the neighbor may afterwards make upon his own land in the exercise of his right.

The latest and the most authoritative statement of the law of England upon this point before the American Revolution is that of Chief Baron Comyns, who, citing Rolfe's Abridgment and Siderfin's Reports (2 Rol. Abr. 564; *Palmer v. Fleshees*, 1 Sid. 167), says that an action upon the case lies for a nuisance "if a man dig a pit in his land so

near that my land falls into the pit," but does not lie "if a man build an house, and make cellars upon his soil, whereby an house newly built in an adjoining soil falls down." Com. Dig. "Action upon the Case for a Nuisance," A, C.

In *Thurston v. Hancock*, 12 Mass. 220, 7 Am. Dec. 57, which was decided in 1815, and is the leading American case on this subject, the plaintiff in 1802 bought a parcel of land upon Beacon Hill, in Boston, bounded on the west by land of the town of Boston, and in 1804 built a brick dwelling house thereon, with its rear two feet from this boundary, and its foundation fifteen feet below the ancient surface of the land. The defendants in 1811 took a deed of the adjoining land from the town, and began to dig and remove the earth therefrom, and, though notified by the plaintiff that his house was endangered, continued to do so to the depth of forty-five feet, and within six feet of the rear of the plaintiff's house, and thereby caused part of the earth on the surface of the plaintiff's land to fall away and slide upon the defendant's land, and rendered the foundations of the plaintiff's house insecure, and the occupation thereof dangerous, so that he was obliged to abandon it. The court, after advisement, and upon a review of the earlier English authorities, held that the plaintiff could recover for the loss of or injury to the soil merely, and not for the damage to the house; and Chief Justice Parker, in delivering judgment, said: "It is a common principle of the civil and of the common law that the proprietor of land, unless restrained by covenant or custom, has the entire dominion, not only of the soil, but of the space above and below the surface, to any extent he may choose to occupy it. The law, founded upon principles of reason and common utility, has admitted a qualification to this dominion, restricting the proprietor so to use his own as not to injure the property or impair any actual existing rights of another. *Sic utere tuo ut alienum non lædas.*" "But this subjection of the use of a man's own property to the convenience of his neighbor is founded upon a supposed pre-existing right in his neighbor to have and enjoy the privilege which by such act is impaired." 12 Mass. 224, 7 Am. Dec. 57. "A man in digging upon his own land is to have regard to the position of his neighbor's land, and the probable consequences to his neighbor, if he digs too near his line, and if he disturbs the natural state of the soil he shall answer in damages; but he is answerable only for the natural and necessary consequences of his act, and not for the value of a house put upon or near the line by his neighbor." "The plaintiff built his house within two feet of the western line of the lot, knowing that the town, or those who should hold under it, had a right to build equally near to the line, or to dig down into the soil for any other lawful purpose. He knew also the shape and nature of the ground, and that it was impossible to dig there without causing excavations. He built at his peril, for it was not possible for him, merely by building upon his own ground, to deprive the other party of such use of his as he should deem most advantageous. There was no right acquired by his ten years' occupation to keep his neigh-

bor at a convenient distance from him." "It is, in fact, *damnum absque injuria*." 12 Mass. 229, 7 Am. Dec. 57.

Upon the facts of that case it was questionable whether the acts of the defendant would not have caused the falling away of the plaintiff's land if no house had been built thereon; and yet the court held the plaintiff not to be entitled to recover any damages for the fall of his house, without regard to the question whether the weight of the house did or did not contribute to the fall of his soil into the pit dugged by the defendant. No claim for like damages was made in this commonwealth until more than forty years afterwards, when the decision in *Thurston v. Hancock* was followed and confirmed. *Foley v. Wyeth*, 2 Allen, 131, 79 Am. Dec. 771.

In *Foley v. Wyeth* the court, after stating that the right of support from adjoining soil for land in its natural state stands on natural justice, and is essential to the protection and enjoyment of property in the soil, and is a right of property which passes with the soil without any grant for the purpose, said: "It is a necessary consequence from this principle that for any injury to his soil, resulting from the removal of the natural support to which it is entitled, by means of excavation of an adjoining tract, the owner has a legal remedy in an action at law against the party by whom the work has been done and the mischief thereby occasioned. This does not depend upon negligence or unskillfulness, but upon the violation of a right of property which has been invaded and disturbed. This unqualified rule is limited to injuries caused to the land itself, and does not afford relief for damages by the same means to artificial structures. For an injury to buildings, which is unavoidably incident to the depression or slide of the soil on which they stand, caused by the excavation of a pit on adjoining land, an action can only be maintained when a want of due care or skill, or positive negligence, has contributed to produce it." 2 Allen, 133, 79 Am. Dec. 771. And it was accordingly adjudged that if the defendant in that case, by excavating and carrying away earth on her own land, caused the plaintiff's land to fall and sink into the pit which she had dug, she was liable for the injury to the soil of the plaintiff; but that, in the absence of any proof of negligence in the execution of the work, the jury could not take into consideration, as an element of damage for which compensation could be recovered, the fact that the foundation of the plaintiff's house had been made to crack and settle, although the weight of his house did not contribute to the sliding or crumbling away of the soil.

By the modern authorities, in Great Britain, it is clear that a right to the support of a building by adjacent land can arise only by grant or prescription. *Wyatt v. Harrison*, 3 B. & Ad. 871; *Partridge v. Scott*, 3 M. & W. 220; *Caledonian Railway v. Sprot*, 2 Macq. 449; *Bonomi v. Backhouse*, E. B. & E. 622, and 9 H. L. Cas. 503.

In *Bonomi v. Backhouse*, in which an action was maintained by an owner of land and of an ancient house for damage occurring within six years from the working of coal mines, 280 yards from the house,

more than six years before the commencement of the action, Mr. Justice Willes, delivering the judgment in the Exchequer Chamber, which was affirmed by the House of Lords, said: "The right to support of land and the right to support of buildings stand upon different footings as to the mode of acquiring them; the former being *prima facie* a right of property analogous to the flow of a natural river, or of air, though there may be cases in which it would be sustained as matter of grant, whilst the latter must be founded upon prescription or grant, express or implied; but the character of the rights, when acquired, is in each case the same." *E. B. & E.* 654, 655. And Lord Wensleydale said: "I think it perfectly clear that the right in this case was not in the nature of an easement, but that the right was to the enjoyment of his own property, and that the obligation was cast upon the owner of the neighboring property not to interrupt that enjoyment." 9 *H. L. Cas.* 513.

The cases of *Brown v. Robins*, 4 *H. & N.* 186, *Hunt v. Peake*, *H. R. V. Johns.* 705, and *Stroyan v. Knowles*, 6 *H. & N.* 454, in which it was held that in an action for causing soil to sink, which would have sunk if there had been no building upon it, the damages recovered might include the injury to the buildings also, are directly opposed to our own cases of *Thurston v. Hancock* and *Foley v. Wyeth*, in the latter of which *Brown v. Robins* was before the court.

Upon a question of this kind, affecting all the lands in the commonwealth, it would be unjustifiable and mischievous for the court to change a rule of law which has been established and acted upon here for sixty years. Even in England it is held that for digging upon neighboring land, and thereby causing the plaintiff's land to sink and his building to fall, although the jury find that the land would have sunk if there had been no building upon it, yet no action will lie, if no appreciable damage is proved to the land without the building. *Smith v. Thackerah*, *L. R. 1 C. P.* 564.

The weight of American authority is in accordance with the decisions of this court. It has generally been considered that for an excavation causing an injury to the soil in its natural state an action would lie, but that without proof of a right by grant or prescription in the plaintiff, or of actual negligence on the part of the defendant, no action would lie for an injury to buildings by excavating adjoining land not previously built upon. *Panton v. Holland*, 17 *Johns.* 92, 8 *Am. Dec.* 369; *Lasala v. Holbrook*, 4 *Paige*, 169, 25 *Am. Dec.* 524; *Hay v. Cohoes Co.*, 2 *N. Y.* 159, 162, 51 *Am. Dec.* 279; *McGuire v. Grant*, 25 *N. J. Law*, 356, 67 *Am. Dec.* 49; *Richart v. Scott*, 7 *Watts*, 460, 32 *Am. Dec.* 779; *Richardson v. Vermont Central Railroad*, 25 *Vt.* 465, 60 *Am. Dec.* 283; *Beard v. Murphy*, 37 *Vt.* 99, 102, 86 *Am. Dec.* 693; *Shrieve v. Stokes*, 8 *B. Mon.* 453, 48 *Am. Dec.* 401; *Charles v. Rankin*, 22 *Mo.* 566, 66 *Am. Dec.* 642.

It is difficult to see how the owner of a house can acquire by prescription a right to have it supported by the adjoining land, inasmuch as he does nothing upon, and has no use of, that land, which can be

seen or known or interrupted or sued for by the owner thereof, and therefore no assent of the latter can be presumed to the acquirement of any right in his land by the former. The English cases are founded on an analogy to the doctrine of ancient lights, which is not in force in this country. *Hide v. Thornborough*, 2 Car. & K. 250, 255, and *Stansell v. Jollard*, there cited; *Solomon v. Vintners' Co.*, 4 H. & N. 585, 599, 602; *Chasemore v. Richards*, 7 H. L. Cas. 349, 385, 386; *Greenleaf v. Francis*, 18 Pick. 117, 122; *Keats v. Hugo*, 115 Mass. 204, 215, 15 Am. Rep. 80; *Richart v. Scott*, 7 Watts, 460, 462, 32 Am. Dec. 779; *Napier v. Bulwinkle*, 5 Rich. Law, 311, 324. But this case does not require us to determine that question, because there is no evidence that the structures and improvements upon the plaintiff's land have been there for twenty years.

Nor is it necessary to consider whether negligence on the part of the defendant could enlarge the measure of his liability; because the case stated does not find that he was negligent, nor set out any facts from which actual negligence can be inferred. The cause of action is that the plaintiff has an absolute right to have her soil stand in its natural condition, and that any one who injures that right is a wrongdoer, independently of any question of negligence. *Foley v. Wyeth*, 2 Allen, 131, 133, 79 Am. Dec. 771; *Hay v. Cohoes Co.*, 2 N. Y. 159, 162, 51 Am. Dec. 279; *Richardson v. Vermont Central Railroad*, 25 Vt. 465, 471, 60 Am. Dec. 283; *Humphries v. Brogden*, 12 Q. B. 739.

The fact that the defendant was not the owner of the adjoining land affords him no exemption. It was never considered necessary in an action of this kind, to allege that the defendant owned or occupied the land on which the digging was done that injured the plaintiff's soil. *Smith v. Martin*, 2 Saund. 400, and note; *Nicklin v. Williams*, 10 Exch. 259. Even an agent of the owner of the adjoining land would be liable for his own negligence and positive wrongs, for his principal could not confer upon him any authority to commit a tort upon the property or the rights of another. *Bell v. Josselyn*, 3 Gray, 309, 63 Am. Dec. 741; *Story on Agency*, § 311. And, upon the case stated, the defendant appears not to have been an agent of the owner of the land, but to have removed the soil therefrom for his own benefit, by permission of Gillighan, who had a like agreement with and license from the owner, and it is at least doubtful whether the owner of the land could be held responsible for the defendant's acts. *Gayford v. Nicholls*, 9 Exch. 702; *Hilliard v. Richardson*, 3 Gray, 349, 63 Am. Dec. 743.

The case finds that the defendant ceased his work towards the end of October, and left the bank in such a shape that by the effect of rains and frost it was rendered insufficient to hold the soil of the plaintiff in its natural condition, and began to give way at once, although the plaintiff's soil was not actually disturbed till the month of March following. The necessary inference is that by the operation of natural and ordinary causes upon the land as it was left by the excavations of the defendant, and which he took no precaution to guard against, part

of the soil of the plaintiff's land slid and fell off, and for the injury so caused to her soil this action may be maintained. But she cannot maintain an action for the injury to her fences and shrubbery, because her natural right and her corresponding remedy are confined to the land itself, and do not include buildings or other improvements thereon.

The remaining question is of the measure of damages. The peculiar form of the case stated, in this respect, as might be inferred from its terms, and as was admitted at the argument, has been occasioned by incorporating into it the substance of the award of an arbitrator. It is agreed that the "damages occasioned to the plaintiff by loss of and injury to her soil alone, caused by the acts of the defendant, amount to ninety-five dollars." We are of opinion that she is entitled to recover that sum, and no more. She is clearly not entitled to recover the cost of putting her land into and maintaining it in its former condition, because that is no test of the amount of the injury. *McGuire v. Grant*, 25 N. J. Law, 356, 67 Am. Dec. 49. She cannot recover the difference in market value, because it does not appear that that difference is wholly due to the injury to her natural right in the land. It may depend upon the present shape of the lot, upon the improvements thereon, or upon other artificial circumstances, which have nothing to do with the natural condition of the soil.

Judgment for the plaintiff for \$95.

(If the person excavating on his own land be called A, and the owner of the adjacent premises be called B, the following cases may arise: [1] B's land may have no buildings thereon, and may fall through A's digging, though A's work is done carefully. A is liable. The damages are, by some decisions, the diminution in the value of B's land [*McGuire v. Grant*, 25 N. J. Law, 356, 67 Am. Dec. 49; *Schultz v. Bower*, 57 Minn. 493, 59 N. W. 631, 47 Am. St. Rep. 630; *Moellering v. Evans*, 121 Ind. 195, 22 N. E. 989, 6 L. R. A. 449]; by other decisions, the actual loss of and injury to the soil [*McGettigan v. Potts*, 149 Pa. 155, 24 Atl. 198; *Gilmore v. Driscoll*, supra 44]. All the cases agree that the cost of restoring the land to its former condition is not the measure of damages [Id.]. [2] B's land may have a building [or buildings] thereon, and both his land and building may fall [or land fall and building be injured]. Then, [a] if A's digging were done carefully, and yet it would have caused B's soil to fall if there had been no building thereon, A is liable. By English decisions he is liable for the injury to the building as well as to the soil [*Brown v. Robins*, 4 H. & N. 186]; but by *Gilmore v. Driscoll*, ante 44, he is liable only for the injury to the soil. See *Gildersleeve v. Hammond*, 109 Mich. 431, 67 N. W. 519, 521, 33 L. R. A. 46. If, however, in this case [a] the fall of B's land would not have caused any appreciable damage, A is not liable. *Smith v. Thackerah*, L. R. 1 C. P. 564. [b] If A digs carefully, and B's land would not have fallen unless the building had been thereon, A is not liable, for the real cause of the injury is the weight of the superstructure. *Hemsworth v. Cushing*, 115 Mich. 92, 72 N. W. 1108; *Obert v. Dunn*, 140 Mo. 476, 41 S. W. 901; *Clemens v. Speed*, 93 Ky. 284, 19 S. W. 660, 19 L. R. A. 240; *Booth v. Rome*, etc., R. Co., 140 N. Y. 267, 275, 35 N. E. 592, 24 L. R. A. 105, 37 Am. St. Rep. 552. [c] If the injury to B's land and building was due to A's negligence in excavating, A is liable. *Balt. & P. R. Co. v. Reaney*, 42 Md. 117; *Louisville*, etc., R. Co. v. *Bonhayo*, 94 Ky. 67, 21 S. W. 526; *Irvine v. Smith*, 204 Pa. 58, 53 Atl. 510; *Gildersleeve v. Hammond*, 109 Mich. 431, 67 N. W. 519, 33 L. R. A. 46 [a valuable case]; *Ketcham v. Newman*, 141 N. Y. 205, 210, 36 N. E. 197,

24 L. R. A. 102; *Moellering v. Evans*, 121 Ind. 195, 22 N. E. 989, 6 L. R. A. 449. The care required of A is usually said to be "reasonable care" [*Ketcham v. Newman*, *supra*; *City of Quincy v. Jones*, 76 Ill. 231, 20 Am. Rep. 243; *Clemens v. Speed*, *supra*], or "the care that a man of ordinary prudence would exercise in the circumstances of the particular situation" [*Larson v. Metr. R. Co.*, 110 Mo. 234, 19 S. W. 416, 16 L. R. A. 330, 33 Am. St. Rep. 439; cf. *Gildersleeve v. Hammond*, 109 Mich. 431, 67 N. W. 519, 33 L. R. A. 46]. Some cases hold that A should give notice to B of his intention to excavate, unless B already has knowledge thereof [*Schultz v. Byers*, 53 N. J. Law, 442, 22 Atl. 514, 13 L. R. A. 569, 26 Am. St. Rep. 435; *Clemens v. Speed*, 93 Ky. 284, 19 S. W. 660, 19 L. R. A. 240], at least if he intends to dig below B's foundation wall [*Krish v. Ford* (Ky.) 43 S. W. 237], so that B may shore up or prop his wall, or otherwise protect himself from injury [see last three cases cited; also, *Lapp v. Guttenkunst* (Ky.) 44 S. W. 964]; while other cases deny that there is, by common law, any duty to give notice [*Dorrity v. Rapp*, 72 N. Y. 307, 310; *Trower v. Chadwick*, 3 Bing. N. C. 334; *Id.*, 4 Bing. N. C. 1; see *Larson v. Metr. R. Co.*, 110 Mo. 234, 19 S. W. 416]. In some states there are statutes requiring the giving of notice. *First Nat. Bk. v. Villegra*, 92 Cal. 96, 28 Pac. 97. In New York there is a statute, applicable to New York City, that if a person excavates more than 10 feet below the curb, he must protect at his own expense a wall on the neighbor's adjoining land, "if afforded the necessary license to enter on such land"; otherwise the neighbor must protect his own wall, as at common law. *Ketcham v. Newman*, 141 N. Y. 205, 36 N. E. 197, 24 L. R. A. 102.

The clear weight of authority now supports the view approved in *Gilmore v. Driscoll*, *ante*, 44, that a prescriptive right cannot be acquired for the support of a building by adjacent land. *Mitchell v. Mayor, etc., of Rome*, 49 Ga. 19, 15 Am. Rep. 669; *Tunstall v. Christian*, 80 Va. 1, 56 Am. Rep. 581; *Winn v. Abeles*, 35 Kan. 85, 10 Pac. 443, 57 Am. Rep. 138; *Handlan v. McManus*, 42 Mo. App. 551; *Clemens v. Speed*, 93 Ky. 284, 19 S. W. 660, 19 L. R. A. 240; *Sullivan v. Zeiner*, 98 Cal. 346, 33 Pac. 209, 20 L. R. A. 730. There are, however, many dicta to the contrary, and in England such a prescriptive right may be gained. *Dalton v. Angus*, L. R. 6 A. C. 740.

Similar rules apply in cases of subjacent support, i. e., where one man owns the surface of land, and another owns the underlying strata. *Wilms v. Jess*, 94 Ill. 464, 34 Am. Rep. 242; *Pringle v. Vesta Coal Co.*, 172 Pa. 438, 33 Atl. 690; *Robertson v. Coal Co.*, 172 Pa. 566, 33 Atl. 706; *Yandes v. Wright*, 66 Ind. 319, 32 Am. Rep. 109; *Marvin v. Brewster Mining Co.*, 55 N. Y. 538, 14 Am. Rep. 322.)

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(140 N. Y. 267, 35 N. E. 592, 24 L. R. A. 105, 37 Am. St. Rep. 552.)

BOOTH v. ROME, W. & O. T. R. CO. (in part).

(Court of Appeals of New York. December 5, 1893.)

#### BLASTING ON LAND—INJURY TO NEIGHBORING PROPERTY—LIABILITY OF RAILROAD COMPANY.

A railroad company which, having to do blasting on its own land in order to conform its roadbed to the established grade, exercises due care in doing it, when this is the only practically available method of removing the rock, is not liable for injury to a building on plaintiff's adjoining property, when such injury is attributable merely to concussion of the atmosphere or jarring of the ground, and no trespass is committed by casting rocks on plaintiff's premises. If, however, the blasting were negligently done, causing such damage, an action would lie.

Appeal from Supreme Court, General Term, Fifth Department.

Action by Sophia Booth against the Rome, Watertown & Ogdensburg Terminal Railroad Company for injuries to plaintiff's property resulting from concussion of the atmosphere or jarring of the ground caused by blasting on defendant's right of way. From a judgment of the general term (63 Hun, 624, 17 N. Y. Supp. 336) affirming a judgment for plaintiff, defendant appeals. Reversed.

ANDREWS, C. J. The plaintiff, upon the findings of the jury, sustained a serious injury. It is true that witnesses on the part of the defendant gave evidence tending to show that the house was imperfectly constructed, and that the foundation walls were giving way before the excavation was commenced. But, the verdict having been affirmed by the general term, there can be no controversy here that the blasting caused damage to the house to the amount of the verdict. But mere proof that the house was damaged by the blasting would not alone sustain the action. It must further appear that the defendant, in using explosives, violated a duty owing by him to the plaintiff in respect of her property, or failed to exercise due care. Wrong and damage must concur, to create a cause of action. If the injury was occasioned by the omission to use due care, this alone would sustain the action, even if the right of the defendant to use explosives in removing the rock was conceded. If one, by carelessness in making an excavation on his own land, causes injury to an adjoining building, even where the owner of the house has no easement of support, he will be liable. *Leader v. Moxton*, 3 Wils. 460; *Lawrence v. Railway Co.*, 16 Adol. & E. (N. S.) 643-653; *Leake*, Real Prop. 248. The law exacts from a person who undertakes to do even a lawful act on his own premises, which may produce injury to his neighbor, the exercise of a degree of care measured by the danger, to prevent or mitigate the injury. The defendant could not conduct the operation of blasting on its own premises, from which injury might be apprehended to the property of his neighbor, without the most cautious regard for his neighbor's rights. This would be reasonable care only under the circumstances.

The plaintiff, however, on this record, is precluded from claiming that the judgment may be sustained because of negligence in the mode of blasting. It must be assumed from concessions made on the trial, and from the rule of law laid down by the court, that blasting was the only mode of removing the rock practically available, that it was conducted with due care, and that it was necessary to enable the defendant to conform the roadbed to the established grade. This is a case, therefore, of unavoidable injury to the plaintiff's house, occasioned by the act of the defendant in blasting on his own premises in order to adapt them to a lawful use; the mode adopted being the only practicable one, and the work having been prosecuted with due care and without negligence. The question is whether the act of the defendant, connected with the resulting injury, was a legal wrong, for which the plaintiff has a right of action.

The general rule that no one has absolute freedom in the use of his property, but is restrained by the coexistence of equal rights in his neighbor to the use of his property, so that each, in exercising his right, must do no act which causes injury to his neighbor, is so well understood, is so universally recognized, and stands so impreguably in the necessities of the social state, that its vindication by argument would be superfluous. The maxim which embodies it is sometimes loosely interpreted as forbidding all use by one of his own property, which annoys or disturbs his neighbor in the enjoyment of his property. The real meaning of the rule is that one may not use his own property to the injury of any legal right of another. The cases are numerous where the lawful use of one's property causes injury to adjacent property, for which there is no remedy, because no right of the adjacent owner is invaded, although he suffers injury. The cases of excavation furnish a striking illustration. The easement of natural support of the land of one by the land of the adjacent owner applies only to lands in their natural condition, and does not extend so as to give the owner of a building erected on the confines of his land the right to have it supported laterally by the land of his neighbor; and so it has become the settled doctrine of the law that if one, by excavating on his own land adjacent to the land of his neighbor, using due care, causes a building on his neighbor's land to topple over, there is no remedy, provided the weight of the building caused the land on which it stood to give way. There is, in the case supposed, injury, but no wrong, because what was done by the adjacent owner was in the lawful and permitted use of his own property. *Wyatt v. Harrison*, 3 Barn. & Adol. 871; *Partridge v. Scott*, 3 Mees. & W. 220; *Lasala v. Holbrook*, 4 Paige, 170, 25 Am. Dec. 524; *Thurston v. Hancock*, 12 Mass. 220, 7 Am. Dec. 57.

The fundamental proposition upon which the plaintiff's counsel rests his argument in support of the recovery is that the use of the explosives in blasting constituted, under the circumstances, a private nuisance, and that, according to the general rule of law, one who creates or maintains a nuisance is liable for any special injury to person or property resulting therefrom. The right of the defendant to excavate on its land for its roadbed is not challenged, but the right to use the destructive agency of gunpowder in the work of excavation, liable to produce injury, and which did occasion it, is denied. The exception is not to the thing done, but to the mode of doing it. It is to be observed, however, that, under the concessions in the case and the rulings on the trial, it must be assumed that the excavation could not have been done except by the use of explosives. This mode of doing the work was therefore of the substance of the right, if the right existed at all. It has been frequently said that the right of an owner of land to use his property as he likes does not justify the maintaining of a nuisance or the commission of a trespass; and *Blackstone*, after stating that where one, by smelting works on his own land, causes noxious vapors, which injure the

corn or grain on his neighbor's land or damages his cattle, this would be a nuisance, proceeds to say "that if you do any other act in itself lawful, which yet being done in that place, necessarily tends to the damage of another's property, it is a nuisance, for it is incumbent on him to find some other place to do that act, where it will be less offensive." 2 Bl. Comm. c. 13, p. 218. There are many illustrations in the books of the doctrine stated by the learned commentator, that the use of one's own land for the purpose of a lawful trade may become a nuisance to his neighbor. But whether a particular act done upon, or a particular use of, one's own premises, constitutes a violation of the obligations of vicinage, would seem to depend upon the question whether such act or use was a reasonable exercise of the right of property, having regard to time, place, and circumstances. It is not everything in the nature of a nuisance which is prohibited. There are many acts which the owner of land may lawfully do, although it brings annoyance, discomfort, or injury to his neighbor, which are *damnum absque injuria*. The case of the building caused to fall by an excavation in an adjoining lot, already referred to, is an illustration. The right of an owner of a mine to excavate the mineral in his mine, although by so doing it causes the water to collect therein, and to be discharged into an adjacent mine on a lower level, thereby causing damage to the mine of such adjacent owner, is another illustration of a lawful use of property, followed by damage to the property of another, for which no action lies. *Smith v. Kenrick*, 7 C. B. 515; *Baird v. Williamson*, 15 C. B. (N. S.) 376; *Wilson v. Waddell*, 2 App. Cas. 95. In referring to these cases in *Hurdman v. Railway Co.*, 3 C. P. Div. 168, the court said: "The owner of lands holds his right to the enjoyment thereof subject to such annoyance as is the consequence of what is called the 'natural use by his neighbor of his land,' and that, where an interference with his enjoyment by something in the nature of a nuisance is the cause of complaint, no action can be sustained, if this is the result of a natural use by a neighbor of his land." Whether a particular act or thing constitutes a nuisance may depend on the circumstances and surroundings. The use of premises for mechanical or other purposes, causing great noise, disturbing the peace and quiet of those living in the vicinity, and rendering life uncomfortable, or filling the air with noxious vapors, or causing vibration of the neighboring dwellings, constitute nuisances, and such use is not justified by the right of property. *Fish v. Dodge*, 4 Denio, 311, 47 Am. Dec. 254; *McKeon v. See*, 51 N. Y. 300, 10 Am. Rep. 659; *Cogswell v. Railroad Co.*, 103 N. Y. 10, 8 N. E. 537, 57 Am. Rep. 701. These and like cases are those where the property of the owner is appropriated to a permanent use, which is a constant and serious interference with the enjoyment by other property owners of their property. But there is a manifest distinction between acts and uses which are permanent and continuous, and temporary acts, which are resorted to in the course of adapting premises to some lawful use.

For example, the erection of an iron building adjacent to a dwelling might, for the time being, cause as much noise and discomfort as would arise from conducting the business of finishing steam boilers on adjacent premises; but this would not constitute a nuisance, and the owner of the dwelling would have no remedy. The streets may be obstructed temporarily, subject to municipal regulations, for the deposit of building materials, and the party would not be chargeable with maintaining a nuisance. The test of the permissible use of one's own land is not whether the use or the act causes injury to his neighbor's property, or that the injury was the natural consequence, or that the act is in the nature of a nuisance, but the inquiry is, was the act or use a reasonable exercise of the dominion which the owner of property has by virtue of his ownership over his property, having regard to all interests affected, his own and those of his neighbors, and having in view, also, public policy.

The rule announced by the trial judge, that the use, by an owner of property, of explosives, in excavating his land, is at his peril, and imposes liability for any injury caused thereby to adjacent property, irrespective of negligence, is far-reaching. It would constitute, if sustained, a serious restriction upon the use of property, and in many cases greatly impair its value. The situation in the city of New York furnishes an apt illustration. The rocky surface of the upper part of Manhattan island makes blasting necessary in the work of excavation, and, unless permitted, the value of lots, especially for business uses, would be seriously affected. May the man who has first built a store or warehouse or dwelling on his lot, and has blasted the rock for a basement or cellar, prevent his neighbor from doing the same thing, when he comes to build on his lot adjoining, on the ground that by so doing his own structure will be injured? Such a rule would enable the first occupant to control the uses of the adjoining property, to the serious injury of the owner, and prevent, or tend to prevent, the improvement of property. The first occupant, in building on his lot, exercised an undoubted legal right. But his prior occupation deprived his neighbor of no legal right in his property. The first occupant acquires no right to exclude an adjoining proprietor from the free use of his land, nor to use his own land to the injury of his neighbor subsequently coming there. *Platt v. Johnson*, 15 Johns. 213, 8 Am. Dec. 233; *Thurston v. Hancock*, supra; *Tipping v. Smelting Co.*, 1 Ch. App. 66; *Campbell v. Seaman*, 63 N. Y. 568, 20 Am. Rep. 567. The fact of proximity imposes an obligation of care, so that one engaged in improving his own lot shall do no unnecessary damage to his neighbor's dwelling; but it cannot, we think, exclude the former from using the necessary and usual means to adapt his lot to any lawful use, although the means used may endanger the house of his neighbor.

We have found no case directly in point upon the interesting and important practical question involved in this appeal. It was held in the leading case of *Hay v. Cohoes Co.*, 2 N. Y. 159, 51 Am. Dec.

279, that the right of property did not justify the owner of land in committing a trespass on the land of his neighbor by casting rocks thereon in blasting for a canal on his own land for the use of his mill, although he exercised all due care in executing the work. In that case there was a physical invasion by the defendant of the land of the plaintiff. This, the court held, could not be justified by any consideration of convenience or necessity connected with the work in which the defendant was engaged. In the conflict of rights the court considered that public policy required that the right of the defendant to dig the canal on his own land must yield to the superior right of the plaintiff to be protected against an invasion of his possession by the act of the defendant. The case of *Benner v. Dredging Co.*, 134 N. Y. 156, 31 N. E. 328, 17 L. R. A. 220, 30 Am. St. Rep. 649, was the case of an injury to the plaintiff's house, resulting from the jarring caused by the blasting of rocks in Hell Gate; and it was held that the injury was remediless, for the reason that the defendant was acting under the authority of the government of the United States, by virtue of a contract authorized by congress. It has been held that the keeping of gunpowder in large quantities near inhabited dwellings is a nuisance, and in the case of explosion subjects the party keeping it to liability for damages occasioned thereby. *Myers v. Malcolm*, 6 Hill, 292, 41 Am. Dec. 744; *Heeg v. Licht*, 80 N. Y. 579, 36 Am. Rep. 654. So, also, it has been held that the working of quarries by the use of gunpowder, to the injury of property in the vicinity, gives a right of action. *City of Tiffin v. McCormack*, 34 Ohio St. 638, 32 Am. Rep. 408; *Scott v. Bay*, 3 Md. 431. Many of the cases cited by the counsel are cases of the permanent appropriation of property, for damages, or noxious uses causing damage. But the defendant here was engaged in a lawful act. It was done on its own land, to fit it for a lawful business. It was not an act which, under all circumstances, would produce injury to its neighbor, as is shown by the fact that other buildings near by were not injured. The immediate act was confined to its own land; but the blasts, by setting the air in motion, or in some other unexplained way, caused an injury to the plaintiff's house. The lot of the defendant could not be used for its roadbed until it was excavated and graded. It was to be devoted to a common use; that is, to a business use. The blasting was necessary, was carefully done, and the injury was consequential. There was no technical trespass. Under these circumstances, we think, the plaintiff has no legal ground of complaint. The protection of property is doubtless one of the great reasons for government. But it is equal protection to all which the law seeks to secure. The rule governing the rights of adjacent landowners in the use of their property seeks an adjustment of conflicting interests through a reconciliation by compromise, each surrendering something of his absolute freedom so that both may live. To exclude the defendant from blasting to adapt its lot to the contemplated uses, at the instance of the plaintiff, would not be a compromise between

conflicting rights, but an extinguishment of the right of the one for the benefit of the other. This sacrifice, we think, the law does not exact. Public policy is sustained by the building up of towns and cities and the improvement of property. Any unnecessary restraint on freedom of action of a property owner hinders this. The law is interested, also, in the preservation of property and property rights from injury. Will it, in this case, protect the plaintiff's house by depriving the defendant of his right to adapt his property to a lawful use, through means necessary, usual, and generally harmless? We think not.

The judgment should be reversed, and a new trial ordered, with costs to abide the event. All concur.

(To the same effect is *Holland House Co. v. Baird*, 169 N. Y. 136, 62 N. E. 149.)

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(40 N. J. Eq. 447, 3 Atl. 168.)

#### OCEAN GROVE CAMP MEETING ASS'N v. COMMISSIONERS OF ASBURY PARK.

(Court of Chancery of New Jersey. October Term, 1885.)

##### SUBTERRANEAN WATERS—DIVERSION.

Complainants, by boring for water, on land owned by them, to a depth of about 400 feet, had obtained a flow of 50 gallons per minute. Subsequently defendants, needing water for use on their land, three-eighths of a mile from complainants', and having failed to obtain a supply by boring thereon, sank a shaft on land of third parties, by permission of the latter, within 500 feet of complainants' well, to nearly the same depth, and thereby secured a flow of 30 gallons a minute, and thereupon the supply from complainants' well fell to 30 gallons per minute. *Held* that, in the absence of proof that the water was taken from a stream, it must be presumed to be the property of the owner of the fee; and complainants could not maintain an action to compel defendants to close the well so opened by the latter, or to restrain them from sinking other wells nearer complainants' well.

On order to show cause why injunction should not issue.

**BIRD, V. C.** More than 15 years ago the complainants purchased a large tract of land fronting upon the ocean, chiefly for the purpose of a summer resort to exercise the right of worship. The enterprise has so grown that in winter it has a population of about 5,000, and in summer of 10,000 or 15,000. The authorities soon discovered that, to preserve the good health of the residents and visitors, it was absolutely necessary to improve their water-supply and sewerage system. To do this they bored for water, and at the depth of over 400 feet struck water which gave them a flow of 50 gallons per minute at an elevation above the surface of 28 feet. This they carried into the city by means of pipes, and supplied therewith about 70 hotels and

cottages. They also applied it to the improvement of their sewerage system. The volume of water thus produced continued to flow undiminished in quantity and with unabated force until the action of the defendants now complained of, and to restrain which the bill in this cause was filed. The Commissioners of Asbury Park, a corporate body, purchased a large tract of land immediately north of and adjacent to the tract owned by Ocean Grove. Under their management, this, too, has become a famous seaside resort. Its population is equal to, if not greater at all times than, that of Ocean Grove. The authorities saw a like necessity for an increased supply of wholesome water. They entered into a contract with others, a portion of these defendants, to procure for them water by boring in the earth. These, their agents, sank several shafts to the depth of over 400 feet without satisfactory success. One shaft yielded about 4 gallons to the minute, and another, which yielded the most, only 9. All of the wells were upon the land and premises of the Asbury Park Association. It became evident, and is manifest to the most casual observer, that these wells would not supply the volume of water needed. It was also manifest that the experiment to procure water by digging upon their own land had been quite reasonably extended, although not so complete as to satisfy the mind that they cannot obtain water on their own premises as well as elsewhere, since it is in evidence that there are two wells on their premises, sunk by individuals, which produce 15 gallons each per minute, being as much in quantity as they procure from the well which is complained of. Failing in their efforts upon their own premises, they go elsewhere, on the land owned by individuals, and, procuring a right from individual owners, sink a shaft upon the public highway, near to the land of the complainants, and within 500 feet of the complainants' well. This bore extended to the depth of 416 feet, within 8 feet of the depth of complainants' well. At this depth they secured a flow of water at the rate of 30 gallons per minute, and the supply from the complainants' well was almost immediately decreased from 50 gallons to 30 per minute. The diminution in water was immediately felt by many of those who depended for a supply from this source in Ocean Grove. The Asbury Park authorities propose to sink other wells still nearer the well of complainants. This bill asks that they may be prohibited from so doing, and that they may be commanded to close the well already opened, which, it is alleged, is supplied from the same source that the complainants' well is supplied from.

The complainants are first in point of time. They are upon their own land and premises. They procure water from their own soil to be used in connection with their said premises, in the improvement and beneficial enjoyment of their occupation. In this they have exercised an indefeasible and unqualified right. It matters not whether the water which they obtain is from a pond or under-ground basin, or only the result of percolation, or from a flowing stream. The defendants went from their own land upon the land of strangers, and obtained permission to bore for water, and there sink their shaft, procur-

ing water from the same source that the complainants procured their water, and diverted it and carried it to their premises, three-eighths of a mile, for use. Can they be restrained from doing this? A very careful consideration of a great many authorities leads me to the conclusion that they cannot at the instance of the complainants. *Ang. Water-Courses*, §§ 109-114, inclusive; *Gould, Waters*, § 280; *Ballard v. Tomlinson*, 26 Ch. Div. 194; *Chasemore v. Richards*, 7 H. L. Cas. 349, 5 Hurl. & N. 982; *Acton v. Blundell*, 12 Mees. & W. 324; *Chase v. Silverstone*, 62 Me. 175, 16 Am. Rep. 419; *Roath v. Driscoll*, 20 Conn. 533, 52 Am. Dec. 352; *Village of Delhi v. Youmans*, 45 N. Y. 362, 6 Am. Rep. 100; *Goodale v. Tuttle*, 29 N. Y. 459; *Wheatley v. Baugh*, 25 Pa. 528, 64 Am. Dec. 721; *Frazier v. Brown*, 12 Ohio St. 294.

The courts all proceed upon the ground that waters thus used and diverted are waters which percolate through the earth, and are not distinguished by any certain and well-defined stream, and consequently are the absolute property of the owner of the fee, as completely as are the ground, stones, minerals, or other matter to any depth whatever beneath the surface. The one is just as much the subject of use, sale, or diversion as the other. The owner of a mine encounters innumerable drops of water escaping from every crevice and fissure. These, when collected, interfere with his progress, and he may remove them, although the spring or well of the land-owner below be diminished or destroyed. So the owner or owners of a bog, marsh, or meadow may sink wells therein, and carry off the waters collected in them, to the use or enjoyment of a distant village or town, although the waters of a large stream upon the surface be thereby so diminished as to injure a mill-owner who had enjoyed the use of the waters of the stream for many years. Upon these principles, there can be no doubt but that every lot-owner in Ocean Grove or Asbury Park could sink a well on his lot to any depth, and, in case one should deprive his neighbor of a portion or all of his supposed treasure, no action would lie. A moment's reflection will enable every one to perceive that such conditions or contingencies are necessarily incident to the ownership of the soil. In the case before me there is no proof that the waters in question are taken from a stream, and I have no right to presume that they are. The presumption is the other way. It seems to be my very plain duty to discharge the order to show cause, with costs.

(This rule as to percolating waters is well established. The following cases may be cited in addition to those referred to in the above decision: *Brown v. Illius*, 27 Conn. 84, 71 Am. Dec. 49; *Lybe's Appeal*, 106 Pa. 626, 51 Am. Rep. 542; *Wilson v. New Bedford*, 108 Mass. 261, 265, 11 Am. Rep. 352; *Bloodgood v. Ayers*, 108 N. Y. 400, 405, 15 N. E. 433, 2 Am. St. Rep. 443; *Wheelock v. Jacobs*, 70 Vt. 162, 4 Atl. 41, 43 L. R. A. 105, 67 Am. St. Rep. 659. Neither an action at law or in equity will lie for the damages sustained.

In Maine it has been held that if one who sinks a well, and draws off his neighbor's percolating waters, acts in good faith, he is not liable, but that he is liable if the act were done maliciously and for the "sole purpose of inflicting

damage upon the neighbor." *Chesley v. King*, 74 Me. 164, 43 Am. Rep. 569; *Stevens v. Kelley*, 78 Me. 445, 6 Atl. 868, 57 Am. Rep. 813; S. P. in dicta, *Greenleaf v. Francis*, 18 Pick. 117; *Wheatley v. Baugh*, 25 Pa. 528, 64 Am. Dec. 721. This doctrine is, however, denied in various other states and in England, the general rule being followed that "an act which is lawful in itself does not become unlawful because done with a malicious or wrongful motive." Mayor, etc., of *Bradford v. Pickles* [1895] A. C. 587; *Wheelock v. Jacobs*, 70 Vt. 162, 167, 40 Atl. 41, 43 L. R. A. 105, 67 Am. St. Rep. 659; *Huber v. Merkel*, 117 Wis. 355, 94 N. W. 354, 356, 62 L. R. A. 589; *Phelps v. Nowlen*, 72 N. Y. 39, 28 Am. Rep. 93, and cases cited.

In New York the general rule above stated as to percolating waters is maintained, but it has been held not applicable in a case where a city, in order to obtain a more extensive water supply, constructed a large pumping plant by which the underground waters were drained off from the neighboring lands [a total area of from five to eleven square miles], to the great injury of the farmers there residing. It was realized by the city in advance that just such results would follow, and the court characterized its acts as "unreasonable" and "unjust." *Forbell v. City of N. Y.*, 164 N. Y. 522, 58 N. E. 644, 51 L. R. A. 695, 79 Am. St. Rep. 666; *Smith v. City of Brooklyn*, 18 App. Div. 340, 46 N. Y. Supp. 141, s. c. on appeal 160 N. Y. 357, 54 N. E. 787, 45 L. R. A. 664. As to the measure of damages, see *Reisert v. City of N. Y.*, 174 N. Y. 196, 66 N. E. 731. To the same effect is *Katz v. Walkinshaw* [Cal.] 70 Pac. 663, 74 Pac. 766. Other recent cases hold that one may draw percolating waters from his neighbor's land for a "reasonable or beneficial use," but not to let them go to waste. *Barclay v. Abraham* [Iowa] 96 N. W. 1080; *Stillwater Water Co. v. Farmer* [Minn.] 93 N. W. 907, 60 L. R. A. 875.)

**In some classes of cases, there must be damage sustained in order that there may be a cause of action for tort.**

(5 Best & S. 384.)

ROBERTS et ux. v. ROBERTS.

(Court of Queen's Bench. June 3, 1864.)

#### SLANDER—SPECIAL DAMAGE.

In an action by husband and wife for slander of the latter, the declaration alleged that the wife was a member of a certain religious sect and of one of the societies of such sect; that the sect and its societies, and the members thereof, were subject to rules and regulations, by which a member of one such society could not become a member of another society in the sect, unless the leaders or elders of the first society certified that such member was morally and otherwise fit to be a member; and that by reason of words spoken by defendant of the wife, imputing to her immoral conduct, she was not allowed to continue to be a member of the society, and the leaders or elders thereof refused to certify that she was morally or otherwise fit to be a member of the sect, or of any society of the same, and she was not allowed to become a member of a certain society thereof, and was prevented from attending religious worship, and was injured in her good name and reputation, and became sick and greatly distressed in body and mind. *Held*, that no special damage was alleged sufficient to make the words actionable.

### Demurrer to declaration.

Action by Robert Roberts and Margaret Roberts, his wife, for an alleged slander on the latter.

The declaration stated that the plaintiff Margaret was a member of a sect of Protestant dissenters, to-wit, Calvinistic Methodists, and was a member of a private society and congregation of that sect held at Denbigh, in North Wales, and the sect, and the different societies of it, were subject to certain rules and regulations, and the different members of the sect and the societies were respectively subject to those rules and regulations, and under the control and authority of the several respective societies, and of the leaders of the same, with respect to the moral and religious conduct of such members, and with respect to their being respectively allowed and permitted to be and continue to be members of the different societies and congregations of the sect; and by those rules and regulations a member of one society in the sect could not become a member of another society in the sect unless the leaders or elders of the first-mentioned society certified that the said member was morally and otherwise fit to be a member of such sect, and of a society of the same; and the defendant, being a member of the sect, and of the society to which the plaintiff Margaret then belonged, and well knowing the premises, falsely and maliciously spoke and published of the plaintiff Margaret, and of her as a member of such sect and society, and in the presence of the leaders or elders and other members of the society and congregation which the plaintiffs and the defendant had just before then been attending, the false and scandalous words following, in the Welsh language, (setting them out;) which words, being translated into the English language, have the meaning and effect following, and were so understood by the persons to whom they were so spoken and published; that is to say, "You [meaning the plaintiff Robert Roberts] have got for a wife [meaning the plaintiff Margaret] as great a whore as any in the town of Liverpool. I had connection with her several times, the last time a night or two before she left for Liverpool;" meaning thereby that the plaintiff Margaret had been guilty of such immoral conduct as would prevent her being allowed and permitted to remain, become or be a member of any society and congregation of the sect aforesaid; and by means of the premises the plaintiff Margaret was not allowed or permitted to continue or be any longer a member of the society and congregation aforesaid, and was turned out of the same, and the leaders or elders of the society refused to certify that the plaintiff Margaret was morally or otherwise fit to be a member of the sect or of any society or congregation of the same; and the plaintiff Margaret, being desirous of becoming a member of a society and congregation of the sect in Liverpool, was not allowed or permitted or able to become a member of the society in Liverpool, and was prevented from attending religious worship; and by means of the premises the plaintiff Margaret became and was greatly injured in her good name and reputation, and became sick and ill, and greatly

distressed in body and mind. Averment, that, by means of the premises, the plaintiff Robert Roberts had been put to and incurred great expenses in and about nursing the plaintiff Margaret, and endeavoring to get her cured from her sickness, illness, and distress of mind, and had sustained divers other injuries and damages; and the plaintiffs claimed £500.

McIntyre, for defendant.

The words in the declaration are not actionable without special damage. *Allsop v. Allsop*, 5 Hurl. & N. 534; *Lynch v. Knight*, 9 H. L. Cas. 577. And no special damage is alleged sufficient to render the words actionable by reason of such damage. The allegation that the plaintiff Margaret was injured in her good name and reputation, and became sick and ill and distressed in body and mind, is not sufficient. *Allsop v. Allsop*, 5 Hurl. & N. 534. [Crompton Hutton, for plaintiffs: That is admitted.] The remaining head of special damage, that she was not allowed to continue a member of the society and congregation of Calvinistic Methodists, and was prevented from attending religious worship, is not temporal or pecuniary damage. The first part amounts to no more than that she was excluded from associating with particular persons. It is not alleged that she was a teacher in the society and congregation, or that she derived any special advantage from being a member of it. As to the other part, the elders could not prevent her from attending the chapel. In *Bateman v. Lyall*, 7 C. B. (N. S.) 638, there was an allegation of loss of customers by the husband in his business in consequence of the words spoken of his wife by the female defendant.

Crompton Hutton, for plaintiffs.

Sufficient special damage to the wife is shown for which the husband may maintain this action. If the special damage must be pecuniary, an action for slander of a wife never could be maintained, as the damage would be to the husband, not to the wife. An action will lie for words spoken by which a woman has lost her marriage. *Davis v. Gardiner*, 4 Coke, 16b. [Blackburn, J.: Marriage has always been considered a valuable consideration.] In *Lynch v. Knight*, 9 H. L. Cas. 577, the special damage relied upon was not the natural and probable consequence of the words spoken; but it was the opinion of Lord Campbell, at page 589, that loss of consortium or conjugal society would give a cause of action to a wife as well as to a husband. [Blackburn, J.: Lord Cranworth, page 595, was strongly inclined to agree in that, though Lord Wensleydale was of a different opinion. Crompton, J.: The loss of consortium of the wife has always been considered a temporal damage in an action by the husband for criminal conversation.] In the present case there is a loss of something more than consortium vicinorum. The wife was a member of a religious society and congregation, and as such entitled to a seat in the chapel belonging to that society and congregation; but, in consequence

of the words spoken by the defendant, she was turned out of it. [McIntyre: It is not alleged that she was entitled to a seat in the chapel without payment. Blackburn, J.: Unless she has been deprived of something of pecuniary value, it is difficult to distinguish the present case from that of slander of a chaste unmarried woman.] The court will not extend that doctrine. Value is attached to social advantages and position, of which the court will take notice. The wife had a status as member of the society and congregation, which she has lost. [Cockburn, C. J.: She had no other benefit from it except attending a congregational place of worship, and she may get that benefit whether she attends as a member of the society or not.] A right to a seat in a church or chapel is an advantage of which the law will take notice. The reason why the loss of consortium vicinorum is not sufficient special damage is that the most capricious motives may deprive a person of it. Com. Dig., "Action upon the Case for Defamation," D. 30.

COCKBURN, C. J. No cause of action is shown in this declaration, as it does not allege special damage sufficient to make the words spoken of the female plaintiff actionable. It is admitted that the loss of consortium vicinorum is not sufficient; and I am of opinion that the loss by the female plaintiff of membership of this society and congregation, which appears to have been constituted for religious or spiritual purposes, amounts at most to no more than the loss of the merely nominal distinction of being able to call herself a member of it. It does not appear that any real or material advantages attach to membership; such as loss of seat in the chapel, or of the opportunity of attending divine worship there. If, by reason of the words spoken, the female plaintiff had been excluded from the meetings for religious worship, or from anything substantial which by right attached to membership of the society, I should be disposed to hold that it was sufficient special damage. I think that to prevent a woman whose character for chastity is assailed from bringing an action for the purpose of vindicating it is cruel; but, as the law at present stands, such an action is not maintainable, unless it be shown that the loss of some substantial or material advantage has resulted from the speaking of the words. That is not shown in this declaration, and therefore I reluctantly hold that the demurrer is good. If, upon further inquiry, anything can be found amounting to such special damage as the law requires, the plaintiffs may have leave to amend their declaration.

CROMPTON, J. On the last observation made by the lord chief justice I wish to remark that the amendment should be immediate, so that the cause may be tried at the coming assizes. I agree that the present case falls within the rule that the loss of consortium vicinorum is not sufficient special damage. Here is no loss of a temporal nature; or, if there be any, it is merely nominal. Though I wish the law were different in the case of words affecting the chastity of women, yet the line must be drawn somewhere between words

which are and words which are not actionable; and, if we held that the action for slander could be supported by the allegation that the plaintiff had suffered some nominal special damage, we must apply that doctrine to all kinds of less disparaging words, and should thereby encourage actions which ought not to be brought, as for saying that a person did some disreputable act, though not essentially criminal. My only doubt is whether the being prevented from attending religious worship is sufficient special damage; but, if it was conducted in a chapel, the female plaintiff could not be prevented from attending and occupying a seat there, especially if she paid for her seat. We do not, however, know how that is; it is not even stated that this society had a chapel. The special damage alleged is of a nominal nature, and therefore our judgment must be for the defendant.

BLACKBURN, J. The law upon the subject of disparaging words spoken of other persons is not in a satisfactory state. For words written an action is maintainable, though possibly not more than one farthing damages could be obtained; whereas for words spoken imputing unchastity to a woman no action can be maintained unless special damage is shown, for which purpose there must be material injury to the interest of the person slandered. What is here alleged is no more than loss of the consortium vicinorum.

Judgment for the defendant.

(The rule of the common law, as declared in this case, that an action will not lie for spoken words imputing unchastity to a woman, unless there be proof of special damage of a pecuniary nature, has been changed by statute in many states of this country.)

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(El., Bl. & El. 622.)

BONOMI et ux. v. BACKHOUSE (In part).

(Court of Queen's Bench. June 7, 1858.)

**LATERAL SUPPORT OF LAND—INJURY BY WORKING MINES—CAUSE OF ACTION ACCRUES WHEN DAMAGE RESULTS.**

Plaintiff was owner of the reversion of an ancient house, and defendant, more than six years before action brought, worked some coal mines on his own land at 280 yards distance from the house. This excavation caused damage to plaintiff's house, but this damage did not result until within six years of action brought.

*Held*, that no cause of action accrued for the mere excavation by the defendant in his own land, so long as it caused no damage to the plaintiff, and that the cause of action did accrue when the actual damage first occurred; hence, that the action was not barred by the statute of limitations.

WILLES, J. The question argued before us may be stated in a very few words. The plaintiff was owner of the reversion of an ancient house. The defendant, more than six years before the com-

mencement of the action, worked some coal mines 280 yards distant from it. No actual damage occurred until within the six years.

Question. Is the statute of limitations an answer to the action? Or, in other words, did the cause of action accrue within the six years?

There is no doubt that for an injury to a right an action lies; but the question is, what is the plaintiff's right? Is it that his land should remain in its natural state, unaffected by any act done in the neighboring land, or is it that nothing should be done in the neighboring land from which a jury would find that damage might possibly accrue? There is no doubt that in certain cases an action may be maintained, although there is no actual damage. The rule laid down by Sergeant Williams in note 2 to *Mellor v. Spateman*, 1 Wm. Saund. 346b, is that whenever an act injures another's right, and would be evidence in future in favor of the wrongdoer, an action may be maintained for an invasion of the right, without proof of any specific damage. This is a reasonable and sensible rule; but it has no application to the present case, for the act of the defendant in getting the coal would be no evidence in his favor as to any future act. Getting the coal was an act done by him in his own soil by virtue of his dominion over it. If the question were unaffected by decision, we cannot but think that the contention on the part of the plaintiffs in error is correct. That on behalf of the defendant is that the action must be brought within six years after the excavation is made, and that it is immaterial whether any actual damage has occurred or not. The jury, according to this view, would have, therefore, to decide upon the speculative question whether any damage was likely to arise; and it might well be that in many cases they would, upon the evidence of mineral surveyors and engineers, find that no damage was likely to occur when the most serious injury afterwards might in fact occur, and in others find and give large sums of money for apprehended damage which in point of fact never might arise. This is certainly not a state of the law to be desired. On the other hand, the plaintiffs in error rely upon the ordinary rule that *damnum* and *injuria* must concur to confer a right of action, and that, although only one action could be maintained for damage in respect of such a claim, nevertheless it would be essential that some damage should have happened before a defendant was made liable for an act done in his own land. Actions upon contract and actions of trespass for direct injuries to the land of another are clearly distinguishable.

We are not insensible to the consideration that the holding damage to be essential to the cause of action may extend the time during which persons working minerals and making excavations may be made responsible; but we think that the right which a man has is to enjoy his own land in the state and condition in which nature has placed it, and also to use it in such manner as he thinks fit, subject always to this: that, if his mode of using it does damage to his neighbor, he must make compensation. Applying these two princi-

ples to the present case, we think that no cause of action accrued for the mere excavation by the defendant in his own land, so long as it caused no damage to the plaintiff, and that the cause of action did accrue when the actual damage first occurred.

The judgment must therefore be reversed, and judgment given for the plaintiffs. Judgment reversed.

(This decision was affirmed by the House of Lords, 9 H. L. Cases, 503. To the same effect is *Ludlow v. Hudson Riv. R. Co.*, 6 Lans. [N. Y.] 128.)

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(6 Ill. App. 243.)

**CHICAGO WEST. DIV. RY. CO. v. REND et al. (extract from).**

(Appellate Court of Illinois. April 27, 1880.)

**1. TORT—DISTINCT LEGAL WRONG—PRESUMPTION OF DAMAGE.**

Where there is a distinct legal wrong, which in itself constitutes an invasion of the right of another, the law will presume that damage follows as the proximate result, and nothing further is necessary to a recovery.

**2. SAME—CASES OF NEGLIGENCE, ETC.—DAMAGE MUST BE PROVED.**

Where the act or omission complained of is not of itself a distinct wrong, as in cases of negligence, damage must be proved to sustain an action.

Appeal from Circuit Court, Cook County; Thomas A. Moran, Judge.

Action by the Chicago West Division Railway Company against William P. Rend and another. From a judgment sustaining a general demurrer to the declaration, plaintiff appeals. Reversed.

The declaration alleged that the defendants negligently drove against the plaintiff's car, and caused an injury to one of its passengers, who recovered a judgment therefor against it, which it was compelled to pay. The plaintiff seeks to recover over from the defendants the amount so paid.

McALLISTER, J. There are two classes of cases of wrongful acts or omissions between which there is a marked distinction. One is that where there is any distinct legal wrong, which in itself constitutes the invasion of the right of another, the law will presume that some damage follows as a natural, necessary, and proximate result. In that case the wrong itself constitutes the right of action. Nothing further is necessary to a recovery, though the extent of it may depend upon the evidence. *Cooley on Torts*, 69; *McConnel v. Kibbe*, 33 Ill. 179, 85 Am. Dec. 265; *Sedg. on Dam.* 445; *Brent v. Kimball*, 60 Ill. 211, 14 Am. Rep. 35.

The latter class is where the act or omission complained of is not of itself a distinct wrong, and can only become so to any particular

individual through injurious consequences resulting therefrom. In such case this consequence must not only be shown, but it must be so connected by averment and evidence with the act or omission as to appear to have resulted therefrom according to the ordinary course of events, and as a proximate result of a sufficient cause. Cooley on Torts, *supra*, and cases in note 1. An instance of this class is where suit is brought against the cashier of a bank for neglect of duty. If no damage has resulted to plaintiff, then, although the neglect be proved, the plaintiff cannot even recover nominal damages. *Commercial Bank v. Ten Eyck*, 48 N. Y. 305. Another is where suit is brought for verbal slander, where the words are not actionable *per se*, but become so only by averring and proving special damages, as in *Vickars v. Wilcocks*, 8 East, 1. In such cases the damages are said to be the gist of the action. Bare negligence, unproductive of damages to another, will not give a right of action; negligence causing damages will do so. *Whitehouse v. Birmingham Can. Co.*, 2 L. J. Exc. 25; *Bailey v. Wolverham Waterworks*, 6 H. & N. 241; *Duckworth v. Johnson*, 4 H. & N. 653.

(The following cases also sustain the doctrine that an action is not maintainable for negligence, unless it causes detriment or injury to the plaintiff: *Harter v. Morris*, 18 Ohio St. 493 [action by client against his attorney for negligence]; *Hinckley v. Krug* [Cal.] 34 Pac. 118 [Id.]; *McAllister v. Clement*, 75 Cal. 182, 16 Pac. 775 [action against notary for neglect in taking acknowledgment to a mortgage]; *Joy v. Morgan*, 35 Minn. 184, 28 N. W. 237 [action for negligence in filing mechanic's lien papers]; *Clay v. Western Union Tel. Co.*, 81 Ga. 285, 6 S. E. 813, 12 Am. St. Rep. 316 [negligent failure to deliver a telegram]; *Ill. Cent. R. Co. v. Benton*, 69 Ill. 174 [negligence of railroad company in sounding whistle or bell at crossings, as statute requires]. "It is the consequences of negligence," it has been said, "not the abstract existence of it, for which a defendant is answerable." *Hart v. Allen*, 2 Watts [Pa.] 114. "Negligence without results is never actionable." *Christner v. Coal Co.*, 146 Pa. 67, 71, 23 Atl. 221; *Conway v. Horse R. Co.*, 90 Me. 199, 38 Atl. 110; *Bluedorn v. Mo. Pac. R. Co.* [Mo.] 24 S. W. 57, 60; *Smith v. Leavenworth*, 15 Kan. 81; *Harlan v. St. Louis, etc., R. Co.*, 65 Mo. 22; *Scott v. Nat. Bk.*, 72 Pa. 471, 13 Am. Rep. 711.)

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(148 N. Y. 640, 43 N. E. 76.)

BUCHHOLZ v. NEW YORK, L. E. & W. R. CO. (In part).

(Court of Appeals of New York. March 3, 1896.)

**PUBLIC NUISANCE—SPECIAL DAMAGE OCCASIONED THEREBY GIVES CAUSE OF ACTION TO INDIVIDUAL.**

Where defendant, a railroad company, unlawfully built a fence across a public highway on which plaintiff's hotel property was situated, and opened a new way at some distance off for travelers to use in reaching the main road again, whereby travel was diverted from plaintiff's premises and his business as a hotel keeper was seriously interrupted, *held*, that the defendant, by obstructing the highway, had caused a public

nuisance, and that the loss and detriment occasioned to the plaintiff was a special injury to him, for which he might maintain an action for damages and for an injunction.

Appeal from Supreme Court, General Term, Second Department.  
The facts, so far as material, are stated in the opinion.

ANDREWS, C. J. Main street, in the village of Port Jervis, as it existed prior to March, 1890, ran in a northerly and southerly direction, passing the plaintiff's premises, upon which for many years had been erected a hotel and barns, used by him for hotel purposes. The plaintiff's lot adjoined lands of the defendant on the north, and, up to the date mentioned, the tracks of the defendant crossed Main street at grade on its own premises, 50 feet or more north of the north line of the plaintiff's lot. In March, 1890, the defendant constructed a bridge over its tracks, 100 feet east of the grade crossing, and connected it with Main street, north of the plaintiff's lot, and an approach thereto on the south from Main street, 100 feet or more south of the plaintiff's premises, and at the same time took up the planking at the grade crossing, and built a fence across Main street north of plaintiff's lot, where the bridge connected with the street. By these acts of defendant the travel on Main street in front of plaintiff's premises was diverted to the new way across the bridge. It left the plaintiff's hotel and premises on a spur of Main street, closed at the north, or on what was, after the change, practically a lane, starting from the point 100 feet south where the new way diverged from Main street. It was found that the plaintiff, by reason of the interference with Main street, sustained special damage, and the facts proved in connection with the use to which the plaintiff's premises were devoted amply justify the finding. But the trial court refused relief, on the ground that, under the circumstances, the plaintiff had suffered no injury to his property for which he was entitled either to damages or an injunction.

There can be no doubt of the general proposition that an unlawful obstruction of a public highway, by an individual or corporation, constitutes a public nuisance, and subjects the party who created or maintains it to an indictment, and to a proceeding for its abatement in behalf of the public. But the public remedy is not, in all cases, exclusive. An individual who has suffered special injury from the nuisance, not common to the whole public, may maintain a private action against the author of the injury for damages, and in a proper case may invoke the jurisdiction in equity to restrain its continuance. The equitable jurisdiction attaches when the legal remedy is inadequate, either because the damages are such that they cannot be measured by a money standard, with any certainty, or where they are continuous, and multiplicity of suits would be likely to result if the remedy was confined to proceedings at law. The injury suffered by the plaintiff in this case from the change in and obstruction of the street, whereby travel was diverted from his premises, and his business as an hotel

keeper seriously interrupted, made a case for equitable interposition, and for the recovery of damages, within the cases in this state, assuming that the defendant's acts were unlawful. *Adams v. Popham*, 76 N. Y. 410; *Callanan v. Gilman*, 107 N. Y. 360, 14 N. E. 264, 1 Am. St. Rep. 831; *Flynn v. Taylor*, 127 N. Y. 596, 28 N. E. 418, 14 L. R. A. 556. See, also, *Story*, Eq. Jur. § 926 et seq.

We think the judgment should be reversed and a new trial ordered. All concur. Judgment reversed.

(This doctrine in regard to public nuisances is well established. *Wakeman v. Wilbur*, 147 N. Y. 657, 42 N. E. 341; *Knowles v. Pa. R. Co.*, 175 Pa. 623, 34 Atl. 974, 52 Am. St. Rep. 860; *Houck v. Wachter*, 34 Md. 265, 6 Am. Rep. 332; *Winterbottom v. Lord Derby*, L. R. 2 Ex. 316; *O'Brien v. Central Iron Co.*, 158 Ind. 218, 63 N. E. 302, 57 L. R. A. 508, 92 Am. St. Rep. 305; *Jones v. City of Chanute*, 63 Kan. 243, 65 Pac. 243; *Van Wegenen v. Cooney*, 45 N. J. Eq. 25, 16 Atl. 689. The "special damage" which the individual must suffer from the public nuisance must be, it is held, "different in kind, and not merely in degree or extent, from that which the general public suffers from the same cause." But though the authorities agree upon this rule, they differ much in their application of it. *Brayton v. Fall River*, 113 Mass. 218, 18 Am. Rep. 470; *Chicago v. Union Bldg. Ass'n*, 102 Ill. 379, 40 Am. Rep. 598; *Atwood v. Partree*, 56 Conn. 80, 14 Atl. 85; *Knowles v. Pa. R. Co.*, supra; *Lansing v. Smith*, 8 Cow. 146; *Id.*, 4 Wend. 9, 21 Am. Dec. 89.)

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(122 Mass. 235, 23 Am. Rep. 322.)

GOTT v. PULSIFER et al. (in part).

(Supreme Judicial Court of Massachusetts. Suffolk. March 7, 1877.)

1. MALICE—FALSEHOODS ABOUT PROPERTY—SPECIAL DAMAGE.

An action for publishing a false and malicious statement, disparaging the plaintiff's property, cannot be maintained without allegation and proof of special damage.

2. SAME—EVIDENCE.

Where the special damage alleged to have resulted from a false publication concerning a statue was the loss of its sale to a certain person, evidence of its value as a scientific curiosity or for purposes of exhibition was immaterial.

3. SAME—EVIDENCE OF MALICE.

Though a newspaper is not liable for the publication of comments on a statue which has been made a subject of public exhibition, without proof of actual malice, it is not necessary that there should be direct proof of an intention to injure the value of the property; such intention being inferable from false statements, exceeding the limits of fair criticism, or recklessly uttered in disregard of the rights of the owner.

Action by Calvin O. Gott against R. M. Pulsifer and others. Verdict for defendants, and plaintiff excepts. Exceptions sustained.

The declaration alleged that the plaintiff owned a colossal statue of great value, known as the "Cardiff Giant"; that the defendants had published a false statement that it had been sold at New Orleans

for \$8, referring to it as a sell, a humbug, and a fraud; and that it had not been sold, but that plaintiff by such publication had lost the sale of the statue for \$30,000.

GRAY, C. J. This action is not for a libel upon the plaintiff, but for publishing a false and malicious statement concerning his property, and could not be supported without allegation and proof of special damage. *Malachy v. Sóper*, 3 Bing. N. C. 371; *S. C.* 3 Scott, 723; *Swan v. Tappan*, 5 Cush. 104. The special damage alleged was the loss of the sale of the plaintiff's statue to Palmer. Evidence of the value of the statue as a scientific curiosity or for purposes of exhibition was therefore rightly rejected as immaterial.

The editor of a newspaper has the right, if not the duty, of publishing, for the information of the public, fair and reasonable comments, however severe in terms, upon anything which is made by its owner a subject of public exhibition, as upon any other matter of public interest, and such a publication falls within the class of privileged communications for which no action can be maintained without proof of actual malice. *Dibdin v. Swan*, 1 Esp. 28; *Carr v. Hood*, 1 Campb. 355; *Henwood v. Harrison*, L. R. 7 C. P. 606.

But, in order to constitute such malice, it is not necessary that there should be direct proof of an intention to injure the value of the property. Such an intention may be inferred by the jury from false statements, exceeding the limits of fair and reasonable criticism, and recklessly uttered in disregard of the rights of those who might be affected by them. Malice in uttering false statements may consist either in a direct intention to injure another, or in a reckless disregard of his rights and of the consequences that may result to him. *Commonwealth v. Bonner*, 9 Metc. 410; *Moore v. Stevenson*, 27 Conn. 14; *Erle, C. J.*, in *Hibbs v. Wilkinson*, 1 F. & F. 608, 610, and in *Paris v. Levy*, 2 F. & F. 71, 74, and 9 C. B. (N. S.) 342, 350; *Cockburn, C. J.*, in *Morrison v. Belcher*, 3 F. & F. 614, 620, in *Hedley v. Barlow*, 4 F. & F. 224, 231, and in *Strauss v. Francis*, 4 F. & F. 1107, 1114.

The only definition of malice given by the learned judge who presided at the trial was therefore erroneous, because it required the plaintiff to prove "a disposition willfully and purposely to injure the value of this statue," as well as "wanton disregard of the interest of the owner." The jury upon the evidence before them, and under the instructions given them, may have been of opinion that the defendants' statements that the plaintiff's statue was an "ingenious humbug," "a sell," and "a fraud," were false, reckless, and unjustifiable, and had the effect of injuring the plaintiff's property, and caused him special damage, and may have returned their verdict for the defendants solely because they were not convinced that they intended such injury.

The ninth request for instructions distinctly called the attention of the court to the necessity of a definition of the legal meaning of

malice in this respect. As the instructions given were erroneous in this particular, and we cannot know that the error did not affect the verdict, the plaintiff is entitled to a new trial, in order that he may satisfy a jury, if he can, under proper instructions, that he has a good cause of action against the defendants.

Exceptions sustained.

(There are various classes of cases wherein malice, by words or acts, is actionable, provided it causes special damage; as, e. g., [a] in cases of malicious disparagement of property [as in the principal case, *supra*], or of title to property. *Dooling v. Budget Pub. Co.*, 144 Mass. 258, 10 N. E. 809, 59 Am. Rep. 83, and cases cited; *Marlin Fire Arms Co. v. Shields*, 171 N. Y. 384, 390, 64 N. E. 163; *Wilson v. Dubois*, 35 Minn. 471, 29 N. W. 68, 59 Am. Rep. 335; *Malachy v. Soper*, 8 Bing. N. C. 371; [b] malicious acts or malicious conspiracies [followed by acts in pursuance thereof] to injure a man in his trade or business, outside the bounds of legitimate competition. *Quinn v. Leatham* (1901) A. C. 495; *Mogul Stshp. Co. v. McGregor*, L. R. 23 Q. B. D. 598, 614, (1892) A. C. 25; *Walker v. Cronin*, 107 Mass. 564; *Barr v. Essex Trades Council*, 53 N. J. Eq. 101, 30 Atl. 881; *Aldridge v. Stuyvesant*, 1 Hall (N. Y.) 210; *Lucke v. Clothing Cutters' Assembly*, 77 Md. 396, 26 Atl. 505, 19 L. R. A. 408, 39 Am. St. Rep. 421; *Smith v. Nippert*, 76 Wis. 86, 44 N. W. 846, 20 Am. St. Rep. 26; *Burton v. Fulton*, 49 Pa. 151. But the malicious exercise of a definite legal right is not actionable, though it does result in damage to another. *Stevenson v. Newnham*, 13 C. B. 297; *Allen v. Flood* [1898] A. C. 1; *Heywood v. Tillson*, 75 Me. 225, 46 Am. Rep. 373; *Raycroft v. Tayntor*, 68 Vt. 219, 35 Atl. 53, 33 L. R. A. 225, 54 Am. St. Rep. 882; *Walker v. Cronin*, 107 Mass., at page 564; *Kiff v. Youmans*, 86 N. Y. 324, 40 Am. Rep. 543; *McCune v. Norwich Gas Co.*, 30 Conn. 521, 79 Am. Dec. 278; *Smith v. Johnson*, 76 Pa. 191.

As to maliciously inducing a man to break a contract with a third person, see post, p. 116.)

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(3 Term R. 51.)

PASLEY et al. v. FREEMAN (in part).

(Hilary Term, 1789.)

#### DECEIT—ELEMENTS OF ACTION—DAMAGE.

Where defendant, to induce plaintiffs to sell goods to a certain person, represented that he was a person safely to be trusted, knowing this to be false and intending to deceive and defraud plaintiffs, and they, relying on and believing his representations, sold the goods on credit as desired, and were unable to collect therefor from the purchaser and wholly lost the goods and their value, defendant is liable for the deceit, though he had no interest in the sale, and had not colluded with any person who had such an interest. The gist of the action is the injury done to the plaintiff, not whether the defendant meant to be a gainer by it. Fraud without damage, or damage without fraud, will not found an action; but, where both concur, an action will lie.

This was an action in the nature of a writ of deceit, to which the defendant pleaded the general issue. And after a verdict for the plaintiffs on the third count, a motion was made in arrest of judgment.

The third count was as follows: "And whereas also the said Joseph Freeman, afterwards, to wit on the 21st day of February in the year of our Lord 1787, at London aforesaid, in the parish and ward aforesaid, further intending to deceive and defraud the said John Pasley and Edward, did wrongfully and deceitfully encourage and persuade the said John Pasley and Edward, to sell and deliver to the said John Christopher Falch divers other goods, wares and merchandizes, to wit, 16 other bags of cochineal of great value, to wit, of the value of £2634. 16s. 1d. upon trust and credit; and did for that purpose then and there falsely, deceitfully, and fraudulently, assert, and affirm, to the said John Pasley and Edward, that the said John Christopher then and there was a person safely to be trusted and given credit to in that respect, and did thereby falsely, fraudulently, and deceitfully, cause and procure the said John Pasley and Edward to sell and deliver the said last mentioned goods, wares, and merchandizes upon trust and credit to the said John Christopher; and in fact they the said John Pasley and Edward, confiding in and giving credit to the said last mentioned assertion and affirmation of the said Joseph, and believing the same to be true, and not knowing the contrary thereof, did afterwards, to wit, on the 28th day of February in the year of our Lord 1787, at London aforesaid, in the parish and ward aforesaid, sell and deliver the said last mentioned goods, wares, and merchandizes, upon trust and credit to the said John Christopher; whereas in truth and in fact at the time of the said Joseph's making his said last mentioned assertion and affirmation, the said John Christopher was not then and there a person safely to be trusted and given credit to in that respect, and the said Joseph well knew the same, to wit at London aforesaid, in the parish and ward aforesaid. And the said John Pasley and Edward further say, that the said John Christopher hath not, nor hath any other person on his behalf, paid to the said John Pasley and Edward, or either of them, the said sum of £2634. 16s. 1d. last mentioned, or any part thereof, for the said last mentioned goods, wares, and merchandizes; but on the contrary the said John Christopher then was and still is wholly unable to pay the said sum of money last mentioned, or any part thereof, to the said John Pasley and Edward, to wit, at London aforesaid, in the parish and ward aforesaid: and the said John Pasley and Edward aver that the said Joseph falsely and fraudulently deceived them in this, that at the time of his making his said last mentioned assertion and affirmation, the said John Christopher was not a person safely to be trusted or given credit to in that respect as aforesaid, and the said Joseph then well knowing the same, to wit, at London aforesaid, in the parish and ward aforesaid; by reason of which said last mentioned false, fraudulent, and deceitful assertion and affirmation of the said Joseph the said John Pasley and Edward have been deceived and imposed upon, and have wholly lost the said last mentioned goods, wares, and merchandizes, and the value thereof,

to wit, at London aforesaid, in the parish and ward aforesaid; to the damage," etc.

Application was first made for a new trial, which after argument was refused; and then this motion in arrest of judgment.

ASHHURST, J. The objection in this case, which is to the third count in the declaration, is that it contains only a bare assertion, and does not state that the defendant had any interest, or that he colluded with the other party who had. But I am of opinion that the action lies notwithstanding this objection. It seems to me that the rule laid down by Croke, J., in *Baily v. Merrell*, 3 Bulst. 95, is a sound and solid principle, namely, that fraud without damage, or damage without fraud, will not found an action; but where both concur an action will lie. The principle is not denied by the other judges, but only the application of it, because the party injured there, who was the carrier, had the means of attaining certain knowledge in his own power, namely, by weighing the goods; and therefore it was a foolish credulity against which the law will not relieve. But that is not the case here, for it is expressly charged that the defendant knew the falsity of the allegation, and which the jury have found to be true: but non constat that the plaintiffs knew it, or had any means of knowing it, but trusted to the veracity of the defendant. And many reasons may occur why the defendant might know that fact better than the plaintiffs; as if there had before this event subsisted a partnership between him and Falch, which had been dissolved: but at any rate it is stated as a fact that he knew it. It is admitted that a fraudulent affirmation, when the party making it had an interest, is a ground of action, as in *Risney v. Selby*, 1 Salk. 211, which was a false affirmation made to a purchaser as to the rent of a farm which the defendant was in treaty to sell to him. But it was argued that the action lies not, unless where the party making it has an interest, or colludes with one who has. I do not recollect that any case was cited which proves such a position: but if there were any such to be found, I should not hesitate to say that it could not be law; for I have so great a veneration for the law as to suppose that nothing can be law which is not founded in common sense or common honesty. For the gist of the action is the injury done to the plaintiff, and not whether the defendant meant to be a gainer by it: what is it to the plaintiff whether the defendant was or was not to gain by it; the injury to him is the same. And it should seem that it ought more emphatically to lie against him, as the malice is more diabolical, if he had not the temptation of gain. For the same reason it cannot be necessary that the defendant should collude with one who has an interest. But if collusion were necessary, there seems all the reason in the world to suppose both interest and collusion from the nature of the act; for it is to be hoped that there is not to be found a disposition so diabolical as to prompt any man to injure another without benefiting himself. But it is said that if this be determined to be law, any man

may have an action brought against him for telling a lie, by the crediting of which another happens eventually to be injured. But this consequence by no means follows; for in order to make it actionable it must be accompanied with the circumstances averred in this count, namely, that the defendant, "intending to deceive and defraud the plaintiffs, did deceitfully encourage and persuade them to do the act, and for that purpose made the false affirmation, in consequence of which they did the act." Any lie accompanied with those circumstances I should clearly hold to be the subject of an action: but not a mere lie thrown out at random without any intention of hurting anybody, but which some person was foolish enough to act upon; for the *quo animo* is a great part of the gist of the action. Another argument which had been made use of is that this is a new case, and that there is no precedent of such an action. Where cases are new in their principle, there I admit that it is necessary to have recourse to legislative interposition in order to remedy the grievance: but where the case is only new in the instance, and the only question is upon the application of a principle recognized in the law to such new case, it will be just as competent to courts of justice to apply the principle to any case which may arise two centuries hence as it was two centuries ago: If it were not, we ought to blot out of our law books one fourth part of the cases that are to be found in them. The same objection might in my opinion have been made with much greater reason in the case of *Coggs v. Bernard*, 1 Salk. 26, for there the defendant, so far from meaning an injury, meant a kindness, though he was not so careful as he should have been in the execution of what he undertook. And indeed the principle of the case does not in my opinion seem so clear as that of the case now before us, and yet that case has already been received as law. Indeed one great reason perhaps why this action has never occurred may be that it is not likely that such species of fraud should be practised unless the party is in some way interested. Therefore I think the rule for arresting the judgment ought to be discharged.

Lord KENYON and BULLER, J., concurred, GROSE, J., dissenting. Rule for arresting the judgment discharged.

(This doctrine that an action will not lie for fraud unless it has caused damage to the plaintiff is well settled. *Ming v. Woolfolk*, 116 U. S. 599, 6 Sup. Ct. 489, 29 L. Ed. 740; *Danforth v. Cushing*, 77 Me. 182; *Dawe v. Morris*, 149 Mass. 188, 21 N. E. 313, 4 L. R. A. 158, 14 Am. St. Rep. 404; *Taylor v. Guest*, 58 N. Y. 262; *Byard v. Holmes*, 34 N. J. Law, 296; *Runge v. Brown*, 23 Neb. 817, 34 N. W. 660.)

In actions of tort, damages may be awarded for the proximate, but not for the remote, consequences of the tortious act.—Nature of this distinction.

— (a) General Principles.

(94 U. S. 469, 24 L. Ed. 256.)

MILWAUKEE & ST. P. RY. CO. v. KELLOGG (In part).

(Supreme Court of the United States. October Term, 1876.)

1. PROXIMATE OR REMOTE CAUSE.

To warrant a finding that negligence, or an act not amounting to wanton wrong, is the proximate cause of an injury, it must appear that the injury was the natural and probable consequence of the negligence or wrongful act, and that it ought to have been foreseen in the light of attendant circumstances. When there is no intermediate efficient cause, disconnected from the primary fault, and self-operating, which produced the injury, the original wrong must be considered as reaching to the effect, and proximate to it.

2. SAME—INJURY BY SPREADING FIRE.

Defendants' elevator, 120 feet high, built of pine lumber, and standing on the bank of a river, was set on fire from a steam-boat, also owned by defendants, which made a landing at the elevator when an unusually strong wind was blowing towards it; and the fire was communicated from the elevator to plaintiff's saw-mill, 538 feet from the elevator, and to his lumber, the nearest pile of which was 388 feet distant from the elevator, in the direction in which the wind was blowing, and they were destroyed. Plaintiff brought an action to recover damages therefor from defendants on the ground of negligence of the latter in setting fire to their elevator. *Held*, that it was not error to refuse to instruct the jury that the injury was too remote from the negligence to afford ground for a recovery, and to submit to them to find whether the burning of the mill and lumber was the result naturally and reasonably to be expected from the burning of the elevator, under the circumstances, and whether it was the result of the continued effect of the sparks from the steam-boat, without the aid of other causes not reasonably to have been expected; and that a finding of the jury that the burning of the mill and lumber was the unavoidable consequence of the burning of the elevator was, in effect, a finding that there was no intervening and independent cause between the negligent conduct of defendants and the injury to plaintiff.

Error to the Circuit Court of the United States for the District of Iowa.

STRONG, J. This was an action to recover compensation for the destruction by fire of the plaintiff's saw-mill and a quantity of lumber, situated and lying in the state of Iowa, and on the banks of the River Mississippi. That the property was destroyed by fire was uncontroverted. From the bill of exceptions it appears that the "plaintiff alleged the fire was negligently communicated from the defendants' steam-boat Jennie Brown to an elevator built of pine lumber, and one hundred and twenty feet high, owned by the defendants, and standing

on the bank of the river, and from the elevator to the plaintiff's saw-mill and lumber-piles, while an unusually strong wind was blowing from the elevator towards the mill and lumber. On the trial, it was admitted that the defendants owned the steam-boat and elevator; that the mill was five hundred and thirty-eight feet from the elevator; and that the nearest of plaintiff's piles of lumber was three hundred and eighty-eight feet distant from it." The verdict of the jury was: (1) That the elevator was burned from the steamer Jennie Brown; (2) that such burning was caused by not using ordinary care and prudence in landing at the elevator, under circumstances existing at that particular time; and (3) that the burning of the mill and lumber was the unavoidable consequence of the burning of the elevator. The only reasonable construction of the verdict is that the fault of the defendants—in other words, their want of ordinary care and prudence—consisted in landing the steamer at the elevator in the circumstances then existing, when a gale of wind was blowing towards it, when the elevator was so combustible and so tall. If this is not the meaning of the verdict, no act of negligence, or want of care, or of fault has been found. And this is one of the faults charged in the declaration. It averred that, while the wind was blowing a gale from the steam-boat towards and in the direction of the elevator, the defendants carelessly and negligently allowed, permitted, and counseled, (or, as stated in another count, "directed,") the steam-boat to approach and lie alongside of or in close proximity to said elevator. This is something more than nonfeasance; it is positive action,—the result, consequence, or outworking, as the jury have found it, of the want of such care as should have been exercised.

An exception has been taken to the refusal of the court to instruct the jury, as requested, that "if they believed the sparks from the Jennie Brown set fire to the elevator through the negligence of the defendants, and the distance of the elevator from the nearest lumber-pile was three hundred and eighty-eight feet, and from the mill five hundred and twenty-eight feet, then the proximate cause of the burning of the mill and lumber was the burning of the elevator, and the injury was too remote from the negligence to afford a ground for a recovery." This proposition the court declined to affirm, and in lieu thereof submitted to the jury to find whether the burning of the mill and lumber was the result naturally and reasonably to be expected from the burning of the elevator; whether it was a result which, under the circumstances, would naturally follow from the burning of the elevator; and whether it was the result of the continued effect of the sparks from the steam-boat, without the aid of other causes not reasonably to be expected. All this is alleged to have been erroneous. The assignment presents the oft-embarrassing question what is and what is not the proximate cause of an injury. The point propounded to the court assumed that it was a question of law in this case, and in its support the two cases of *Ryan v. Railroad Co.*, 35 N. Y. 210, 91 Am. Dec. 49, and *Railroad Co. v. Kerr*, 62 Pa. 353, 1 Am.

Rep. 431, are relied upon. Those cases have been the subject of much criticism since they were decided, and it may perhaps be doubted whether they have always been quite understood. If they were intended to assert the doctrine that when a building has been set on fire through the negligence of a party, and a second building has been fired from the first, it is a conclusion of law that the owner of the second has no recourse to the negligent wrong-doer, they have not been accepted as authority for such a doctrine, even in the states where the decisions were made. *Webb v. Railroad Co.*, 49 N. Y. 420, 10 Am. Rep. 389, and *Railroad Co. v. Hope*, 80 Pa. 373, 21 Am. Rep. 100. And certainly they are in conflict with numerous other decided cases. *Kellogg v. Railroad Co.*, 26 Wis. 224, 7 Am. Rep. 69; *Perley v. Railroad Co.*, 98 Mass. 414, 96 Am. Dec. 645; *Higgins v. Dewey*, 107 Mass. 494, 9 Am. Rep. 63; *Fent v. Railroad Co.*, 59 Ill. 349, 14 Am. Rep. 13. The true rule is that what is the proximate cause of an injury is ordinarily a question for the jury. It is not a question of science or of legal knowledge. It is to be determined as a fact, in view of the circumstances of fact attending it. The primary cause may be the proximate cause of a disaster, though it may operate through successive instruments, as an article at the end of a chain may be moved by a force applied to the other end, that force being the proximate cause of the movement, or as in the oft-cited case of the squib thrown into the market-place. *Scott v. Shepherd*, 2 W. Bl. 892. The question always is, was there an unbroken connection between the wrongful act and the injury,—a continuous operation? Did the facts constitute a continuous succession of events, so linked together as to make a natural whole, or was there some new and independent cause intervening between the wrong and the injury? It is admitted that the rule is difficult of application. But it is generally held that, in order to warrant a finding that negligence, or an act not amounting to wanton wrong, is the proximate cause of an injury, it must appear that the injury was the natural and probable consequence of the negligence or wrongful act, and that it ought to have been foreseen in the light of the attending circumstances. These circumstances, in a case like the present, are the strength and direction of the wind, the combustible character of the elevator, its great height, and the proximity and combustible nature of the saw-mill, and the piles of lumber. Most of these circumstances were ignored in the request for instruction to the jury. Yet it is obvious that the immediate and inseparable consequences of negligently firing the elevator would have been very different if the wind had been less, if the elevator had been a low building constructed of stone, if the season had been wet, or if the lumber and the mill had been less combustible. And the defendants might well have anticipated or regarded the probable consequences of their negligence as much more far-reaching than would have been natural or probable in other circumstances. We do not say that even the natural and probable consequences of a wrongful act or omission are in all cases to be chargeable to the misfeasance or

nonfeasance. They are not, when there is a sufficient and independent cause operating between the wrong and the injury. In such a case, the resort of the sufferer must be to the originator of the intermediate cause. But, when there is no intermediate efficient cause, the original wrong must be considered as reaching to the effect, and proximate to it. The inquiry must therefore always be whether there was any intermediate cause disconnected from the primary fault, and self-operating, which produced the injury. Here lies the difficulty. But the inquiry must be answered in accordance with common understanding. In a succession of dependent events, an interval may always be seen by an acute mind between a cause and its effect, though it may be so imperceptible as to be overlooked by a common mind. Thus, if a building be set on fire by negligence, and an adjoining building be destroyed without any negligence of the occupants of the first, no one would doubt that the destruction of the second was due to the negligence that caused the burning of the first. Yet in truth, in a very legitimate sense, the immediate cause of the burning of the second was the burning of the first. The same might be said of the burning of the furniture in the first. Such refinements are too minute for the rules of social conduct. In the nature of things, there is in every transaction a succession of events more or less dependent upon those preceding, and it is the province of a jury to look at this succession of events or facts, and ascertain whether they are naturally and probably connected with each other by a continuous sequence, or are dis severed by new and independent agencies, and this must be determined in view of the circumstances existing at the time. If we are not mistaken in these opinions, the circuit court was correct in refusing to affirm the defendant's proposition, and in submitting to the jury to find whether the burning of the mill and lumber was a result naturally and reasonably to be expected from the burning of the elevator, under the circumstances, and whether it was the result of the continued influence or effect of the sparks from the boat, without the aid or concurrence of other causes not reasonably to have been expected. The jury found, in substance, that the burning of the mill and lumber was caused by the negligent burning of the elevator, and that it was the unavoidable consequence of that burning. This, in effect, was finding that there was no intervening and independent cause between the negligent conduct of the defendants and the injury to the plaintiff. The judgment must therefore be affirmed.

(The tests laid down in this case for determining whether a cause is proximate or remote have often been approved in subsequent decisions in the various states. [Pullman Palace Car Co. v. Laack, 143 Ill. 242, 32 N. E. 285, 18 L. R. A. 215; Louisville, etc., Ferry Co. v. Nolan, 135 Ind. 60, 34 N. E. 710; Adams v. Young, 44 Ohio St. 80, 4 N. E. 599, 58 Am. Rep. 789; Hammill v. Pa. R. Co., 56 N. J. Law, 370, 29 Atl. 151, 24 L. R. A. 531; Martin v. N. Y. & N. E. R. Co., 62 Conn. 331, 25 Atl. 239; Mo. Pac. R. Co. v. Columbia, 65 Kan. 390, 69 Pac. 338, 58 L. R. A. 399; Atkinson v. Goodrich Transp. Co., 60 Wis. 141, 18 N. W. 764, 50 Am. Rep. 352. These cases contain valuable discussions of the subject. See, also, 13 Am. & Eng. Enc. of Law (2d Ed.) 446 et seq.]

The criticism which it makes of the Ryan and Kerr Cases in New York and Pennsylvania has been concurred in throughout the country, in states where similar questions have arisen, and the doctrines established by these decisions have been repudiated. *Id.*; *Perley v. Eastern R. Co.*, 98 Mass. 414, 96 Am. Dec. 645; *Del. L. & W. R. Co. v. Salmon*, 39 N. J. Law, 299, 23 Am. Rep. 214; *Louisville, etc., R. Co. v. Nitsche*, 126 Ind. 229, 26 N. E. 51, 9 L. R. A. 750, 22 Am. St. Rep. 582; 13 Am. & Eng. Enc. of Law [2d Ed.] 452. Nevertheless the Ryan Case has recently been upheld in New York, and it is now the settled law of that state that damage done by a spreading fire to the immediately adjacent lands is a proximate result, while if the fire runs across the abutting owners' lines upon lands of other proprietors, the damage there done is the remote result, for which the starter of the fire is not liable. *Hoffman v. King*, 160 N. Y. 618, 55 N. E. 401, 46 L. R. A. 672, 73 Am. St. Rep. 715. So the Kerr Case is still the law of Pennsylvania, though doubt has been expressed in a later decision in that state whether it was proper for the court in that case to decide the question instead of leaving it to the jury. *Haverly v. Railroad Co.*, 135 Pa. 50, 58, 19 Atl. 1013, 20 Am. St. Rep. 848.

In some states a party negligently starting a fire has been held liable for the destruction of property caused by it, though it spread over long distances; as, e. g., *Adams v. Young*, 44 Ohio St. 80, 4 N. E. 599, 58 Am. Rep. 789 [200 feet]; *Atkinson v. Goodrich Transp. Co.*, 60 Wis. 141, 18 N. W. 764, 50 Am. Rep. 352 [3,500 feet]; *Poeppers v. Mo., etc., R. Co.*, 67 Mo. 715, 29 Am. Rep. 518 [eight miles]; *Chicago, etc., R. Co. v. McBride*, 54 Kan. 172, 37 Pac. 978 [ten miles]. This was because, under the circumstances as to wind, weather, intervening combustible material, etc., such a result was reasonably to be regarded as natural and probable.)

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(181 Ill. 116, 54 N. E. 897.)

CITY OF DIXON v. SCOTT (in part).

(Supreme Court of Illinois. October 13, 1899.)

**PROXIMATE CAUSE—NEGLIGENCE—ABILITY TO FORESEE CONSEQUENCES.**

To make the negligent act of the defendant the proximate cause of plaintiff's injury, it is not necessary that the particular injury, and the particular manner in which it occurred, might reasonably have been expected to follow such negligent act. It is sufficient that by the exercise of ordinary care he might have foreseen that some injury would result from his negligence, even though he could not have foreseen the particular results.

Appeal from Appellate Court, Second District.

Action by Robert H. Scott, administrator, against the city of Dixon for injuries to plaintiff's decedent. Decedent was traveling on a sidewalk when a neighbor coming in the opposite direction stepped upon one end of a loose board, and the end in front of decedent was thereby raised, caught her foot, and caused her to fall and sustain the injuries complained of. From a judgment of the appellate court (81 Ill. App. 368) affirming a judgment for plaintiff, defendant appeals. Affirmed.

CARTER, J. The court decided properly in refusing the defendant's third instruction, having reference to the question of proximate

cause of the injury. This instruction would have told the jury that, if "it was not natural or reasonable to expect or anticipate that Mrs. Kost, or any one else, would step on the end of one of said planks, and cause the other end to tip up, and thereby trip or cause the plaintiff to fall, and receive the injury complained of," then the plaintiff could not recover. In order to make the negligent act of appellant the proximate cause of the injury, it was not necessary that the particular injury, and the particular manner in which it occurred, might reasonably have been expected to follow from such negligent act. In 16 Am. & Eng. Enc. Law, 438, the author says: "Consequences which follow in unbroken sequence, without an intervening cause, from the original wrong, are natural; and for such consequences the wrongdoer must be held responsible, even though he could not have foreseen the particular results, provided that by the exercise of ordinary care he might have foreseen that some injury would result from his negligence." It would be very unreasonable to make the liability of the defendant depend on the question whether the precise injury complained of, and the manner of its occurrence, ought to have been foreseen. *Car Co. v. Laack*, 143 Ill. 242, 32 N. E. 285, 18 L. R. A. 215.

We find no error, and the judgment must be affirmed. Judgment affirmed.

(This rule is supported by abundant authority. *Hill v. Winsor*, 118 Mass. 251; *Schumaker v. St. Paul, etc., R. Co.*, 46 Minn. 39, 48 N. W. 559, 12 L. R. A. 257; *Hoepper v. Southern Hotel Co.*, 142 Mo. 378, 44 S. W. 257; *Hammill v. Pa. R. Co.*, 56 N. J. Law, 370, 29 Atl. 151, 24 L. R. A. 531; *Atchison, etc., R. Co. v. Parry* [Kan.] 73 Pac. 105; 13 Am. & Eng. Enc. of Law [2d Ed.] 450; 21 Id. 487; cf. *Ehrgott v. Mayor, etc., of N. Y.*, 96 N. Y. 264, 48 Am. Rep. 622.)

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### — (b) Difference Between a Cause and a Condition.

(161 Mass. 182, 36 N. E. 790.)

BOULESTER v. PARSONS.

(Supreme Judicial Court of Massachusetts. Norfolk. March 28, 1894.)

#### CIRCUMSTANCES CONSTITUTING A "CONDITION."

In an action for damages under Pub. St. c. 102, § 93, for the loss of a horse by reason of being bitten by defendant's dog, where it appeared that the horse injured was harnessed to a wagon, and was being led behind and attached to another wagon, it was error not to charge that a man has a right to lead a horse in such manner, and the fact that he was so leading the horse was not such evidence of negligence as to preclude his recovery. The leading of the horse behind the wagon was simply a *condition*, and not, in any just sense, a contributory *cause*, of the injury.

Exceptions from Superior Court, Norfolk County; John Hopkins, Judge.

Action by Jesse O. Boulester against Charles W. Parsons to recover damages for the loss of a horse by reason of being bitten by a dog. To a judgment for defendant, plaintiff excepts. Exceptions sustained.

LATHROP, J. This is an action, under Pub. St. c. 102, § 93<sup>1</sup>, for the loss of a horse alleged to have been bitten by the defendant's dog, in consequence of which the horse died. There was evidence that the plaintiff's brother was driving an express wagon, drawn by a pair of horses, along a country road; that in the rear of this wagon, and attached to it by the reins, was another horse harnessed to a single wagon; and that the defendant's dog ran out and bit the horse attached to the single wagon. The defendant contended that it was negligence on the part of the plaintiff to lead a horse harnessed in a wagon behind and attached to another wagon. The plaintiff thereupon requested the presiding judge to instruct the jury in substance as follows: A man has a right to lead a horse in the way and manner described, and the mere fact that he was so leading a horse is not such evidence of negligence as would preclude the plaintiff from recovering in this action for the bite of the dog. The judge refused so to rule, and submitted the question to the jury whether the method of traveling adopted was negligent, and was such as to induce an attack by the dog. The jury returned a verdict for the defendant, and the plaintiff alleged exceptions to the refusal to rule as requested, and to the instructions given. We are of opinion that the ruling requested should have been given in substance. While the doctrine of contributory negligence has been often said to apply to an action on Pub. St. c. 102, § 93, and we have no doubt that it does apply where the plaintiff incites or provokes a dog, and, it may be, in other cases, the doctrine has no application to the case at bar. The leading of a horse behind a wagon was simply a condition, and not, in any just sense, a contributory cause, of the injury. In *White v. Lang*, 128 Mass. 598, 35 Am. Rep. 402, a person unlawfully traveling on the Lord's day was bitten by a dog, and it was held that his so traveling was merely a condition, and did not prevent his maintaining an action under the statute. To hold that the question whether leading a horse behind a wagon should be submitted to the jury as evidence of negligence on the part of the plaintiff in inducing an attack by a dog would render it necessary to submit to the jury the question whether the color of the horse or of the wagon, or of the clothes of the driver, might not have induced an attack. The law does not pay this respect to the characteristics or prejudices

<sup>1</sup> This statutory provision is as follows: "Every owner or keeper of a dog shall forfeit to any person injured by it double the amount of the damage sustained by him, to be recovered in an action of tort."

of dogs. See *Denison v. Lincoln*, 131 Mass. 236. Exceptions sustained.

(Other valuable cases showing the difference between a "cause" and a "condition" are *Mo. Pac. R. Co. v. Columbia*, 65 Kan. 390, 69 Pac. 338, 58 L. R. A. 399; *Louisville, etc., Ferry Co. v. Nolan*, 135 Ind. 60, 34 N. E. 710; *Lillibridge v. McCann*, 117 Mich. 84, 75 N. W. 288, 41 L. R. A. 381, 72 Am. St. Rep. 553; *Berry v. Sugar Notch Borough*, 191 Pa. 345, 43 Atl. 240; *Delaware, L. & W. R. Co. v. Trautwein*, 52 N. J. Law, 169, 19 Atl. 178, 7 L. R. A. 435, 19 Am. St. Rep. 442; *Hope v. Fall Brook Coal Co.*, 3 App. Div. 70, 38 N. Y. Supp. 1040. See, also, 21 Am. & Eng. Enc. of Law [2d Ed.] 494.)

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— (c) Intervening Operation of a Natural Force.

(4 Bing. 607.)

SIORDET v. HALL et al.

(May 5, 1828.)

NEGLIGENCE—INJURIES TO CARGO—ACT OF GOD.

Where damage was done to a cargo by water escaping through the pipe of a steam boiler, in consequence of the pipe having been cracked by frost, *held*, that this was not an act of God, but must be deemed the proximate result of the captain's negligence in filling his boiler, in mid-winter, several hours before he was to heat the boiler and start on his voyage, although he was but following the common practice to fill overnight when the vessel started in the morning.

Action against the defendants, as carriers by water, for not delivering a cargo in proper condition.

At the trial before BEST, C. J., London sittings after Trinity term last, the defense was that the mischief was done by the act of God, which was one of the risks excepted in the bill of lading. It appeared that the cargo was shipped on the 10th February, and the vessel, a steam vessel, was then tight and staunch. The captain, expecting to start the following morning, caused the water to be pumped into the boiler on the evening of the 10th, as that operation required two hours, and the heating about three more. For this reason, it was his practice, and the practice of steam vessels generally, when they started in the morning, to fill the boiler the preceding evening. The next morning it was ascertained that the pipe which conducts the water into the boiler had cracked, that a considerable quantity of water had escaped by this means into the hold, and that much of the cargo was damaged. The pipe was a sound and good one, and its bursting was occasioned by the action of frost on the external portion of it. The Chief Justice told the jury that if the water had been unnecessarily placed in the boiler, or, considering the season of the year, improperly left there, without heat to prevent the action of frost upon

the pipe, the mischief was not occasioned by the act of God, but by gross negligence. The jury having found for the plaintiff,

Taddy, Serjt., obtained a rule nisi for a new trial, on the ground of an alleged misdirection by the learned Chief Justice.

Wilde, Serjt., who was to have shown cause, was stopped by the court, who called on

Taddy to support his rule. There was no negligence in filling the boiler overnight, which is the usual and necessary practice where dispatch is required. The accident was immediately occasioned by the frost, and, in law, *causa proxima non remota spectatur*. It is urged that the action of the frost might have been prevented by fire, but that argument would render useless all exceptions in a bill of lading, for all the excepted risks might be avoided by certain precautions—the king's enemies, by convoy; rocks, by care in navigation; and lightning, by conductors. But the meaning of the exceptions is that the owners shall not be liable where the injury proceeds from these causes, unless it has been occasioned purposely. The question in all such cases ought to be, what was the immediate cause of the loss? *Smith v. Shepherd, Abbott, Shipp.* (4th Ed.) pp. 263, 269, pt. 3, c. 4.

BEST, C. J. No one can doubt that this loss was occasioned by negligence. It is well known that frost will rend iron, and, if so, the master of a vessel cannot be justified in keeping water within his boiler, in the middle of winter, when frost may be expected. The jury found that this was negligence, and I agree in their verdict.

The rest of the Court concurred, and the rule was discharged.

(In like manner, when a fire is negligently started, or negligently cared for, and is caused to spread by an ordinary wind, or even by a violent wind which might have been reasonably expected to occur, the negligent defendant, and not the wind, is to be deemed the proximate cause [*Northern Pac. R. Co. v. Lewis*, 51 Fed. 658, 2 C. C. A. 446; *Hays v. Miller*, 70 N. Y. 112; *Lillibridge v. McCann*, 117 Mich. 84, 75 N. W. 288, 41 L. R. A. 381, 72 Am. St. Rep. 553; *Fent v. Toledo, etc., R. Co.*, 59 Ill. 349, 14 Am. Rep. 13; *Higgins v. Dewey*, 107 Mass. 494, 9 Am. Rep. 63; *Louisville, etc., R. Co. v. Nitsche*, 126 Ind. 229, 26 N. E. 51, 9 L. R. A. 750, 22 Am. St. Rep. 582; *Milwaukee, etc., R. Co. v. Kellogg*, 94 U. S. 469, 24 L. Ed. 256, and cases cited]; and so as to the operation of other natural forces, as, e. g., where burning oil floats on the surface of a stream and communicates fire to property [*Kuhn v. Jewett*, 32 N. J. Eq. 647; contra, *Hoag v. Lake Shore, etc., R. Co.*, 85 Pa. 293, 27 Am. Rep. 653]; or where ordinary floods or freshets break through or sweep away dams or railway embankments [*Libby v. Me. Cent. R. Co.*, 85 Me. 34, 26 Atl. 943, 20 L. R. A. 812; *Crawford v. Rambo*, 44 Ohio St. 279, 7 N. E. 429], and in other like cases. But it has often been held that when injuries or losses are occasioned by extraordinary or unprecedented gales or floods or freshets or storms, etc., which could not have been foreseen, these acts of God are the proximate causes, and the persons whose acts constituted the conditions by means of which it was possible for the harm to be accomplished are not responsible; as, e. g., where fire is spread by a whirlwind or extremely violent gale [*Bock v. Grooms (Neb.)* 92 N. W. 603; *Marvin v. Chicago, etc., R. Co.*, 79 Wis. 140, 47 N. W. 1123, 11 L. R. A. 506; *Fahn v. Reichardt*, 8 Wis. 255; *Needham v. King*, 95 Mich. 303, 54 N. W. 891; *Sweeney v. Merrill*, 38 Kan. 216, 16 Pac. 454, 5 Am. St. Rep. 734]; or where structures,

or parts thereof, or things connected therewith, are blown over or blown down by like gales, and injuries result therefrom [Sutphen v. Hedden, 67 N. J. Law, 324, 51 Atl. 721; City of Allegheny v. Zimmermann, 95 Pa. 287, 40 Am. Rep. 649; Blythe v. Denver, etc., R. Co., 15 Colo. 333, 25 Pac. 702, 11 L. R. A. 615, 22 Am. St. Rep. 403]; or where extraordinary floods cause loss of property [Central Trust Co. v. Wabash, etc., R. Co. (C. C.) 57 Fed. 441; Pittsburg, etc., R. Co. v. Gilleland, 56 Pa. 445, 94 Am. Dec. 98; Rodgers v. Cent. Pac. R. Co., 67 Cal. 607, 8 Pac. 377; Libby v. Me. Cent. R. Co., 85 Me. 34, 26 Atl. 943, 20 L. R. A. 812; Borchardt v. Wausau Boom Co., 54 Wis. 107, 11 N. W. 440, 41 Am. Rep. 12; Grand Val. Irr. Co. v. Pitzer, 14 Colo. App. 123, 59 Pac. 420]. There are cases, however, in which a defendant has been held liable for the consequences of an extraordinary gale, etc. Salisbury v. Herchenroder, 106 Mass. 458, 8 Am. Rep. 354; Smith v. Faxon, 156 Mass. 589, 31 N. E. 687.)

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— (d) **Intervening Human Agent, Acting Instinctively or in an Emergency.**

(4 Denio, 464, 47 Am. Dec. 268.)

**VANDENBURGH v. TRUAX.**

(Supreme Court of New York. May Term, 1847.)

**NEGLIGENCE—PROXIMATE OR REMOTE CONSEQUENCES.**

A boy, having had a quarrel with defendant in a city street, ran away from him. Defendant took up a pickaxe, and followed the boy, pursuing him into the store of plaintiff, by whom the boy was employed. In trying to save himself from being struck with the pickaxe, the boy knocked out the faucet from a cask of wine, and part of the wine ran out and was lost. *Held*, that defendant was liable for the damages to plaintiff. One who does an illegal or mischievous act, likely to prove injurious to others, is answerable for all the consequences which may directly and naturally result therefrom, although he did not intend to do the particular injury which followed.

**Error to Schenectady Common Pleas.**

Action by Truax against Vandenburg, brought before a justice of the peace, for damages alleged to have been caused by defendant willfully driving a boy through plaintiff's store, and knocking a cock or faucet from a barrel of wine belonging to plaintiff, causing part of the wine therein to be lost. The evidence was that defendant had quarreled with a negro boy, about 16 or 18 years of age, employed by plaintiff as an hostler, while both were in the street near plaintiff's store in the city of Schenectady; that, the boy having a stone in his hand, defendant took hold of him, and told him to throw down the stone; that the boy did so, and broke loose from defendant and ran away; that defendant then took up a pickaxe, and followed the boy, who fled into plaintiff's store, where defendant pursued him, having the pickaxe in his hand; that, the rear door of the store being shut, the boy, not being able to escape through it without being overtaken, ran behind the counter, as the witness testified he believed, to save himself from being struck with the pickaxe; and that, in doing so,

he knocked out the cock or faucet of a cask of plaintiff's wine, and wine of the value of \$4 was spilt and lost. The justice rendered judgment for plaintiff, which was affirmed by the court of common pleas. Defendant brought error to review the judgment of the common pleas.

BRONSON, C. J. It may be laid down as a general rule that when one does an illegal or mischievous act, which is likely to prove injurious to others, and when he does a legal act in such a careless and improper manner that injury to third persons may probably ensue, he is answerable, in some form of action, for all the consequences which may directly and naturally result from his conduct, and in many cases he is answerable criminally as well as civilly. It is not necessary that he should intend to do the particular injury which follows, nor, indeed, any injury at all. If a man without just cause aim a blow at his enemy, which, missing him, falls upon his friend, it is a trespass upon the friend, and may be murder if a deadly weapon was used, and death ensued. Or if, in attempting to steal or destroy the property of another, he unfortunately wound the owner, or a third person, he must answer for the consequences, although he did not intend that particular mischief. And, although no mischief of any kind may be intended, yet, if a man do an act which is dangerous to the persons or property of others, and which evinces a reckless disregard of consequences, he will be answerable civilly, and in many cases criminally, for the injuries which may follow; as if he discharge a gun, or let loose a ferocious or mad animal, in a multitude of people; or throw a stone from the house-top into a street where many are passing; or keep a large quantity of gunpowder near the dwelling of another. In these and such like cases he must answer for any injury which may result from his misconduct to the persons or property of others. And, if the act was so imminently dangerous to others as to evince a depraved mind, regardless of human life, and death ensue, it will be murder. These are familiar cases, which need not be proved by referring to books. In the case of the lighted squib which was thrown into the market-house, the debate was upon the form of the remedy. The question was whether the plaintiff could maintain trespass *vi et armis*, or whether he should not have brought an action on the case. His right to recover in some form seems not to have been disputed. *Scott v. Shepherd*, 2 W. Bl. 892, 3 Wils. 403. In that case the impulse was given to inanimate matter, while here a living and rational being was moved by fear. But still there is in some respects a striking analogy between the two cases. There the force which the defendant gave to the squib was spent when it fell upon the standing of Yates; and it was afterwards twice put in motion, and in new directions, first by Willis, and then by Ryall, before it struck the plaintiff, and put out his eye. But as the throwing of the squib was a mischievous act, which was likely to do harm to some one, and as the two men who gave the new im-

pulses to the missile acted from terror and in self-defense, the defendant was held answerable as a trespasser for the injury which resulted to the plaintiff. Now, here, although the negro boy may have been wrong at the first, yet when he had thrown down the stone, and was endeavoring to get away from the difficulty into which he had brought himself, the defendant was clearly wrong in following up the quarrel. When the boy ran upon the cask of wine, he was moved with terror produced by the illegal act of the defendant; he was fleeing for his life, from a man in hot pursuit, armed with a deadly weapon. The injury which the plaintiff sustained was not the necessary consequence of the wrong done by the defendant, nor was it so in the case of the lighted squib. But in both instances the wrong was of such a nature that it might very naturally result in an injury to some third person. It is true that the boy might have gone elsewhere, instead of entering the plaintiff's store; and it is equally true that Willis and Ryall might have thrown the squib out of the market-house, which was open on both sides and at one end, instead of tossing it across the market-house among the people there assembled. But in the one case, as well as in the other, the innocent agents were moved by fear, and had no time to reflect upon the most prudent course of conduct. It was quite natural, however, that the boy should flee to his employer for protection. And, finally, the proximate cause of the injury was, in both cases, an intelligent agent.

In *Guille v. Swan*, 19 Johns. 381, 10 Am. Dec. 234, the immediate actors in the wrong which was done to the plaintiff were moved by their sympathy for the defendant, who had brought himself into a perilous condition by ascending in a balloon. The balloon descended into the plaintiff's garden, which was near where it had gone up, and a crowd of people, seeing the defendant hanging out of the car in great peril, rushed into the garden to relieve him, and, in doing so, trod down the plaintiff's vegetables and flowers. For the wrong done by the crowd, as well as for the injury done by himself, the defendant was held answerable as a trespasser. Although the ascent was not an illegal, it was a foolish, act, and the defendant ought to have foreseen that injurious consequences might follow. The case seems not to have been put upon the ground of a concert of action between the defendant and the multitude, but on the ground that the defendant's descent, under such circumstances, would ordinarily and naturally draw a crowd of people about him, either from curiosity, or for the purpose of rescuing him from a perilous situation. It was added, however, that if the defendant had beckoned to the crowd to come to his assistance, they would all have been co-trespassers; and the situation in which the defendant had voluntarily and designedly placed himself was equivalent to a direct request to the crowd to follow him.

If the cases of the squib and the balloon have not gone beyond the limits of the law, the defendant is answerable for the injury which he has brought upon the plaintiff. And there is nearly as much

reason for holding him liable for driving the boy against the wine cask, and thus destroying the plaintiff's property, as there would be if he had produced the same result by throwing the boy upon the cask, in which case his liability could not have been questioned. It is not necessary to inquire whether the action should be trespass or case; for this declaration may as well be considered one thing as the other. It seems that the plaintiff, when before the justice, called the action trespass; but the declaration does not allege that the act was done either *vi et armis* or *contra pacem*. Courts of record might well enough have been less nice than they have been about the distinction between trespass and case. *Seneca Road Co. v. Auburn & R. R. Co.*, 5 Hill, 170. And clearly, as the pleadings in justices' courts are construed in the most liberal manner for the advancement of justice, this may very well be regarded as an action on the case.

Judgment affirmed.

(In *Ricker v. Freeman*, 50 N. H. 420, 9 Am. Rep. 267, a schoolboy, A, seized another, B, by the arm, and swung him around violently two or three times, and then let him go. B, having been made dizzy, came violently against C, who instantly pushed him away, and B then came in contact with a hook, and was injured. B sued A, who contended that as the plaintiff was not a dangerous missile or instrument, like the squib in *Scott v. Shepherd*, C had no right to push him off, and therefore that A was not liable. The court, however, held A responsible. A similar case is *Reynolds v. Pierson*, 29 Ind. App. 273, 64 N. E. 484. In *Markley v. Whitman*, 95 Mich. 236, 54 N. W. 763, 20 L. R. A. 55, 35 Am. St. Rep. 558, some school boys, by mutual consent, formed in line behind one another, then stole up behind another boy, and then, the end one giving a push, it was transmitted through the line, so that the head one was impelled forcibly against the victim of the game, who was severely injured. The boy at the head of the line was sued, and held liable, though he claimed that he did not push, but merely "was pushed." In *Chambers v. Carroll*, 199 Pa. 371, 49 Atl. 128, two boys were sitting on a log in a vacant lot. X drove in carelessly, so that unless they moved he would pass over them. In their efforts to escape one of them moved the log, the result of which was, however, to throw the other under the team. X's negligence was held to be the proximate cause of the injury. In *Tuttle v. Atlantic City R. Co.*, 66 N. J. Law, 327, 49 Atl. 450, 54 L. R. A. 582, 88 Am. St. Rep. 491, the rule is laid down that where one by negligence puts another under reasonable apprehension of personal injury, and in a reasonable effort to escape the latter sustains such injury, the person guilty of negligence is liable.)

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(99 N. Y. 158, 1 N. E. 608, 52 Am. Rep. 12.)

LOWERY v. MANHATTAN RY. CO. (in part).

(Court of Appeals of New York. May 5, 1885.)

#### NEGLIGENCE—PROXIMATE OR REMOTE CONSEQUENCES.

Fire from defendant's locomotive on its elevated railway fell upon a horse attached to a wagon in the street below, and upon the hand of the driver, causing the horse to run away. The driver, after failing in an attempt to stop the horse by driving him against a post of the elevated

railroad, intentionally turned him against the curb-stone to arrest his progress; but the wagon passed over the curb-stone, threw out the driver, and ran over and injured plaintiff. *Held*, that defendant was not relieved from liability for the injury to plaintiff, even though plaintiff would not have been injured but for the driver's diversion of the horse from the natural course it might have taken, and though there might have been an error of judgment on the driver's part; as it might be assumed that by the injury to his hand, and the suddenness of the accident, the driver was so disconcerted as to be unable to manage and control the horse as he would otherwise have done.

Appeal from Court of Common Pleas, City and County of New York, General Term.

Action by Joseph Lowery against the Manhattan Railway Company, for personal injuries to plaintiff, an infant, alleged to have been caused by negligence on the part of defendant.

MILLER, J. The principal question arising upon this appeal relates to the right of the plaintiff to recover for the injuries sustained. The claim of the defendant is that the cause of the injury was too remote to authorize a recovery of any damages whatever, and it is urged that the court erred in denying the motion to dismiss the complaint made by the defendant's counsel on the ground stated, as well as in the charge to the jury that, if they believed "that the coal and ashes fell from the defendant's locomotive through any negligence on the part of the defendant, its servants or agents, and, falling upon the horse, caused him to become unmanageable and run against the plaintiff, inflicting injuries upon him, then the defendant is liable to the plaintiff for his damages occasioned thereby." The same question was also raised by the defendant's counsel by a request to the judge to charge that "if the jury believed the accident occurred through the driver's error of judgment in endeavoring to obtain control of his horse the plaintiff cannot recover," which was refused, and an exception duly taken to the decision. It is urged by the appellant's counsel that, where there is an intermediary agent or medium between the primary cause of the injury and the ultimate result, the rule of law to be applied is that where the original act complained of was not voluntary or intentional, or one of affirmative illegality, or in itself the cause of criminal complaint, but was caused by negligence, the responsibility is limited to the necessary and natural consequences of the act, and that when, beyond that, they are or may be modified or shaped by other causes, they are too remote to be the foundation of legal accountability. The injury sustained by the plaintiff was caused by reason of fire falling from a locomotive of the defendant upon a horse attached to a wagon in the street below, and upon the hand of the driver. The horse became frightened, and ran away, and the driver attempted to guide his movements, and drive him against a post of the elevated railroad so as to stop him. Failing to accomplish this, he intentionally turned the horse, and attempted to run him against the curbstone to make it heavy for him, and so arrest his

progress; but the wagon passed over the curb-stone instead of being arrested by it, and threw the driver out, and ran over and injured the plaintiff. It will be seen that the injury was not caused directly by the defendant, but was produced through the instrumentality of the horse and driver, the latter of whom, it appears, was doing all that lay in his power, and exercising his best judgment, in attempting to stop the frightened animal, and to prevent any further injury; and the question we are called upon to consider here is whether, in view of the fact that the plaintiff may have been injured by reason of the management of the horse by the driver, in consequence of which it was diverted from the natural course it might otherwise have taken, the defendant is relieved from responsibility for the result of the accident.

It may be assumed that at that time the driver, who was smarting from the effects of the burning coal which had fallen upon his hands, and startled by the suddenness of the accident, may have been somewhat disconcerted by the peril in which he was placed, and therefore was unable to manage and control the infuriated animal as he might otherwise have done. The law, however, makes allowances for mistakes, and for errors of judgment which are likely to happen upon such an emergency. It does not demand the same coolness and self-possession which are required when there is no occasion for alarm or a loss of self-control. Where a person is traveling upon a train of cars, and a collision has taken place, or is likely to occur, and he, under the excitement of the moment, jumps from the train, and thereby increases his own danger and chances of injury, although the act of attempting to escape is very hazardous and negligent, yet it is an instinctive act which naturally would take place when a person seeks to avoid great peril, and, though wrong in itself, that fact does not relieve the company from liability if its negligent conduct and a sense of impending danger induced the act.

In the case under consideration the driver was passing along in pursuit of his customary business, driving his horse, when suddenly the falling of the fire upon himself and the horse placed him in a position of great danger, and he was justified in attempting to save his own life and protect himself from injury. If he made a mistake in his judgment, the company was not relieved from liability. If he had allowed the horse to continue on its own way, it is by no means clear that a similar, if not greater, injury might not have been inflicted upon some other person than the plaintiff. It is impossible to determine what the result might have been in such a case, and therefore it is indulging in speculation to say that the driver's act, under the circumstances, was not the best thing that could have been done. In such cases it is difficult to disconnect the final injury from the primary cause, and say that the damages accruing are not the natural and necessary result of the original wrongful act. The defendant was chargeable with an unlawful act, which inflicted an injury upon the driver and the horse in the first instance, and ultimately

caused the injury sustained by the plaintiff. The injury originally inflicted was in the nature of a trespass, and the result which followed was the natural consequence of the act. So long as the injury was chargeable to the original wrongful act of the defendant, it is not apparent, in view of the facts, how it can avoid responsibility. There was no such intervening human agency as would authorize the conclusion that it was the cause of the accident, and therefore it cannot be said that the damages were too remote.

The company would clearly be liable for any direct injury arising from the falling of the burning coals upon the horse if it had been left to pursue its own course uncontrolled by the driver, and there would seem to be no reason why it would not be equally liable when the driver seeks to control the horse, and exercises his best judgment in endeavoring to prevent injury. That he failed to do so for want of strength, or by reason of an error of judgment, does not prevent the application of the principle which controls in such a case. It may, we think, be assumed that such an accident might occur in a crowded street where conveyances are constantly passing, and that the driver of the horse, who might possibly be injured by the defendant's unlawful act, would seek to guide the animal, and, if possible, prevent unnecessary injury. The action of the driver, in view of the exigency of the occasion, whether prudent or otherwise, may well be considered as a continuation of the original act which was caused by the negligence of the defendant, and the defendant was liable as much as it would have been if the horse had been permitted to proceed without any control whatever. We think that the damages sustained by the plaintiff were not too remote, and that the wrongful act of the defendant in allowing the coals to escape from the locomotive, thus causing the horse to become frightened and run, was the proximate cause of the injury, and that the running away of the horse, and the collision with the plaintiff, were the natural and probable consequences of the negligence of the defendant. These views are fully sustained by the decisions of the courts. *Scott v. Shepherd*, 2 W. Bl. 892; *Lynch v. Nurdin*, 1 Adol. & E. (N. S.) 29; *Former v. Geldmecher*, 13 Reporter, 790; *Vaughan v. Menlove*, 32 E. C. L. 219, 740; *Guille v. Swan*, 19 Johns. 381, 10 Am. Dec. 234; *Thomas v. Winchester*, 6 N. Y. 397, 57 Am. Dec. 455; *Vandenburgh v. Truax*, 4 Denio, 464, 47 Am. Dec. 268; *Webb v. Railroad Co.*, 49 N. Y. 420, 10 Am. Rep. 389; *Pollett v. Long*, 56 N. Y. 200; *Putnam v. Railroad Co.*, 55 N. Y. 108, 14 Am. Rep. 190.

We do not deem it necessary to examine these cases in detail, and, while it may be said that in some of them the injury was caused by the positive unlawful act of the defendant at the beginning, in others the original act was lawful, while the consequence which followed resulted from the subsequent interference with the plaintiff's rights. In *Guille v. Swan*, 19 Johns. 381, 10 Am. Dec. 234, *supra*, the act of setting up the balloon was lawful in itself, and the injury which followed was the result of its falling on the premises of the plaintiff in

the city, and attracting the attention of people outside, and thus causing the damages incurred. In the case at bar, the falling of the coals on the horse and driver was caused by the negligence of the defendant's servants, but it was, nevertheless, a direct invasion of the rights of the property and person of the driver, and the owner of the horse and wagon, and produced the injury to the plaintiff the same as the falling of the balloon on the plaintiff's premises in the case last cited. We are unable to perceive any distinction between the two cases which would justify the conclusion that the damages to the plaintiff here were more remote than those which were incurred in the case last cited. The principle which is applicable to both cases is the same, and it is not apparent that any distinction can be drawn between them which would relieve the defendant from responsibility. It is enough to charge the defendant that it was the author and originator of the wrongful act which produced the injury, and hence it is liable for the same as one of the natural consequences arising from the act itself. It is difficult to conceive any valid ground upon which it can be claimed that the effect of the defendant's negligence was not a probable and the natural consequence following the same.

There was no error in the charge of the judge, or refusals to charge as requested, or in any ruling on the trial. The judgment was right, and should be affirmed. All concur, except RAPALLO, J., dissenting, and EARL, J., not voting.

(See *Laidlaw v. Sage*, 158 N. Y. 73, 52 N. E. 679, 44 L. R. A. 216; *Deisenrieter v. Kraus-Merkel Co.*, 97 Wis. 279, 72 N. W. 735; *Goodlander Mill Co. v. Standard Oil Co.*, 63 Fed. 400, 405, 11 C. C. A. 253, 27 L. R. A. 583; *Lynn Gas etc., Co. v. Meriden Ins. Co.*, 158 Mass. 570, 575, 33 N. E. 690, 20 L. R. A. 297, 35 Am. St. Rep. 540.)

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(137 N. Y. 1, 33 N. E. 142, 19 L. R. A. 365, 33 Am. St. Rep. 690.)

#### GIBNEY v. STATE.

(Court of Appeals of New York. January 17, 1893.)

#### DEFECTIVE BRIDGES—NEGLIGENCE—PROXIMATE CAUSE.

Where a child fell through defendant's bridge into a canal, in consequence of defendant's negligence in permitting an opening to remain unguarded, and without contributory negligence on the part of its parents, and the father, in an effort to rescue the child, plunged into the canal, and both were drowned, the death of the father, as well as that of the child, must be deemed a proximate result of defendant's negligence in maintaining the unsafe bridge. Though the father intentionally jumped into the water, still this was a natural and instinctive act occasioned by the child's peril, and the cause of it was the culpable negligence of the defendant.

#### Appeal from Board of Claims.

Action by Nellie C. Gibney, as administratrix of the goods, chattels, and credits of John F. Gibney, deceased, claimant, against the

state of New York. From a finding of the board of claims awarding \$5,000 damages to plaintiff by reason of the death of her husband, John F. Gibney, caused by the negligence of defendant, defendant appeals. Affirmed.

ANDREWS, C. J. We have decided, on the appeal brought from the award of damages for the death of the infant son of the plaintiff, that the evidence authorized a finding of negligence on the part of the state authorities in permitting the opening in the bridge, through which the boy fell into the canal, to remain unguarded, and also the further finding that there was no contributory negligence on the part of the parents of the child, and we therefore affirmed the award. The present appeal is from an award made for damages sustained by the widow and next of kin, arising from the drowning of the plaintiff's husband, and the father of the child, in an attempt to rescue the child from the canal, into which the child had fallen. The material facts are undisputed. The plaintiff, with her husband and child, in an evening in August, while crossing the bridge, met an acquaintance, and the parents stopped to talk with him. The child remained within a few feet of them, and suddenly fell through the opening in the railing of the bridge into the canal below. The father, as soon as he discovered that the boy was gone, plunged into the canal to recover the child, and both father and son were drowned.

It is contended by the attorney general that the negligence of the state in permitting the bridge to remain in an unsafe condition, while it may have been the cause of the death of the boy, cannot be regarded as the cause of the death of the father, although it occurred in an attempt to save the life of the child. It is doubtless true that except for the peril of the child, occasioned by his falling through the bridge into the canal, there would have been no connection between the negligence of the state and the drowning of the father. But the peril to which the child was exposed was, as has been found, the result of the negligence of the state, and the peril to which the father exposed himself was the natural consequence of the situation. It would have been in contradiction of the most common facts in human experience if the father had not plunged into the canal to save his child. But while the immediate cause of the peril to which the father exposed himself was the peril of the child, for the purpose of administering legal remedies, the cause of the peril in both cases may be attributed to the culpable negligence of the state in leaving the bridge in a dangerous condition. There is great difficulty, in many cases, in fixing the responsible cause of an injury. When there is a break in the chain of causes, by the intervention of a new agency, and then an injury happens, is it to be attributed to the new element, and is this to be treated as the originating cause, to the exclusion of the antecedent one, without which no occasion would have arisen for the introduction of a new element? It is impossible to formulate a rule on the subject capable of definite and easy application. The general

rule is that only the natural and proximate results of a wrong are those of which the law can take notice. But where a consequence is to be deemed proximate within the rule, is the point of difficulty. In this case these elements are present: Culpable negligence on the part of the state; the falling of a child into the canal through the opening which the state negligently left in the bridge; the natural and instinctive act of the father in plunging into the canal to rescue the child; the drowning of both; the fact that such an accident as that which befell the child might reasonably have been anticipated as the result of the condition of the bridge; and the further consideration that a parent or other person seeing the child in the water, would incur every reasonable hazard for its rescue. We think it may be justly said that the death, both of the child and parent, was the consequence of the negligence of the state, and that the unsafe bridge was, in a legal and judicial sense, the cause of the drowning of both. We can perceive no sound distinction between this case and the Eckert Case, 43 N. Y. 502, 3 Am. Rep. 721. In that case the railroad train was being propelled at a dangerous speed. The negligence was active. In this case it consisted of an omission; that is, in the failure to originally construct the bridge properly, or permitting it to become dangerous. We do not perceive how the difference in the circumstances of the negligence affects the question of proximate-ness between the cause and the result so as to distinguish, in this respect, the two cases. The Balloon Case, *Guille v. Swan*, 19 Johns. 381, 10 Am. Dec. 234, and the case of *Thomas v. Winchester*, 6 N. Y. 397, 57 Am. Dec. 455, give support to our conclusion. The judgment should be affirmed. All concur. except MAYNARD, J., not sitting.

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— (e) Intervening Human Agent, under Other Circumstances.

(171 Mass. 536, 51 N. E. 1, 41 L. R. A. 794.)

STONE v. BOSTON & A. R. CO. (in part).

(Supreme Judicial Court of Massachusetts. Worcester. July 1, 1898.)

1. NEGLIGENCE—DESTRUCTION OF BUILDINGS BY FIRE—PROXIMATE CAUSE—RE-MOTENESS—EVIDENCE.

Defendant's railway station, freight house, and a platform used mostly for storing oil till the consignees for whom the railroad had brought it should remove it, were situated across the street from plaintiff's buildings. The platform had become thoroughly saturated with oil leaking from the barrels. A teamster not connected with defendant brought goods to be shipped by it, and, in lighting his pipe, threw on the ground a match, which immediately started a fire, which spread to some barrels of oil standing on the platform, and soon destroyed the plaintiff's buildings. All this oil had been on the platform for a longer time than 48 hours, which was prohibited by statute. Plaintiff's buildings would probably not have been burned if this oil had not been on the platform. *Held*,

that the starting of the fire could not be deemed a natural and probable consequence of the defendant's negligent act in leaving the barrels of oil upon the platform, and that therefore plaintiff could not recover.

**2. SAME—ACT OF INTERVENING, INTELLIGENT, RESPONSIBLE PERSON.**

The rule that, where an intelligent, responsible human being has intervened between the original cause and the resulting damage, the law will not look back beyond him, is not true, where it was the duty of the original wrongdoer to anticipate and provide against such intervention, because such intervention was a thing likely to happen in the ordinary course of events. But where such intervening act is not to be anticipated as a probable result, the original wrongdoer is not accountable therefor.

**3. SAME—TRIAL—DIRECTING VERDICT.**

In an action for negligence, where the court is able to say that the injury is the remote, and not the proximate, result of defendant's acts, it is proper to so direct the jury.

**4. SAME—CONCURRENT ACTS OF PARTIES.**

Where defendant was negligent in keeping oil upon a platform which was subsequently fired by the carelessness of another, the acts of defendant and the third person are not concurrent, and they are, therefore, not to be deemed co-tort-feasors, and so liable, both of them, for the resulting damage.

Exceptions from Superior Court, Worcester County; John Hopkins, Judge.

Action by Edward E. Stone against the Boston & Albany Railroad Company. From a verdict for defendant directed by the clerk, plaintiff brings exceptions. Exceptions overruled.

ALLEN, J. This is an action of tort to recover for the loss of the plaintiff's buildings and other property by fire, under the following circumstances: The defendant owned and operated a branch railroad extending from its main line at South Spencer to the village of Spencer, and had at the Spencer terminus a passenger station, a freight house, and a freight yard, all adjoining a public street. On the side of the freight house, and extending beyond it about 75 feet, was a wooden platform about 8 feet wide and 4 feet high, placed upon posts set in the ground, the underside being left open and exposed. The main tracks ran along on the front side of this platform and freight house, and on the rear of the platform there was a freight track, so near as to be convenient to load and unload cars from and upon it. The plaintiff was engaged in the lumber business, buying at wholesale and selling at wholesale and retail, manufacturing boxes, etc. His place of business comprised several buildings, some of which were across the street from the defendant's buildings, and his principal buildings were about 75 feet from the point on the defendant's premises, beneath the platform, where the fire originated. The evidence tended to show that the platform was mostly used for the storing of oil which had been brought upon the railroad, until it was taken away by the consignees; and that the platform had become thoroughly saturated with oil, which had leaked from the barrels, and which not only saturated the platform, but dripped to the ground

beneath. More or less rubbish accumulated from time to time under the platform, and was occasionally carried away. The evidence tended to show that this space below had been cleaned out two or three weeks before the fire. On the day of the fire, September 13, 1893, from 25 to 30 barrels of oil and oil barrels were upon the platform. Some were nearly or quite empty, some were partly full, but the most of them were probably full and nearly full. The only evidence to show how the fire originated tended to prove that one Casserly, a teamster, brought a load of boots to be shipped upon a car which was standing upon the track on the rear side of the platform; that he was smoking a pipe; that he stepped into the car, to wait for the defendant's foreman of the yard, who was to help him unload the boots; that, in stepping in, he stubbed his toe, and knocked some of the ashes and tobacco out of his pipe; that he relighted the pipe with a match, and threw the match down; that at this time he was standing in the door of the car, facing the platform. It must be assumed upon the evidence that the fire caught upon the ground underneath the platform from the match thrown down by Casserly. All efforts to extinguish the fire failed. It spread fast, and was almost immediately upon the top of the platform,—running up a post, according to one of the witnesses,—and very soon it reached the barrels of oil, which began to explode, and the fire communicated to the plaintiff's buildings, and they were burned. There was evidence tending to show that all of the oil had been upon the platform for a longer time than 48 hours. According to the testimony of the plaintiff, the platform was never, to his knowledge, empty of oil or oil barrels. It was completely saturated with oil, and that general condition of things, so far as the platform was concerned, had existed for eight years,—ever since he himself had been there. Upon the evidence introduced by the plaintiff, the court directed a verdict for the defendant.

The plaintiff, in substance, contends before us that the defendant was negligent in storing oil upon the platform, taking into consideration the condition of the platform, and of the ground and material under it, and the length of time during which the oil had been allowed to remain there; that, irrespectively of the question of negligence, the platform with the oil upon it constituted a public nuisance, especially in view of Pub. St. c. 102, § 74, providing that oil composed wholly or in part of any of the products of petroleum shall not be allowed to remain on the grounds of a railroad corporation in a town for a longer time than 48 hours without a special permit from the selectmen; that the defendant is responsible for the damage resulting from the public nuisance, whether the act of starting the fire was due to a third person or not; and that the question should have been submitted to the jury whether the damage to the plaintiff's property was the natural and proximate consequence of the defendant's tort.

Upon the evidence, the supposed tort of the defendant, whether it be called "negligence" or "nuisance," appears to have been limited to the keeping of oil too long upon the platform. Assuming this oil to have been a product of petroleum, and so within the statute cited, nevertheless the defendant, as a common carrier, was bound to transport it and deliver it to the consignees. The oil, as is well known, was an article of commerce, and in extensive use, and the defendant was bound to transport it, and keep it for a reasonable time, after its arrival in Spencer, in readiness for delivery. There was no evidence that the oil was liable to spontaneous ignition, or that the platform was an unsuitable place for its temporary storage till it could be removed, or that the defendant could have prevented the escape of oil upon the platform from leaky barrels. But we may assume without discussion that the defendant was in fault in keeping the oil there so long, and that, if the oil had been removed within 48 hours after its arrival, the fire would probably not have been attended with such disastrous consequences.

Nevertheless, the question remains—and, in our view, this becomes the important and decisive question of the case—whether, assuming that the defendant was thus in fault, the plaintiff introduced any evidence which would warrant any finding by the jury that the damage to his property was a consequence for which the defendant is responsible; or, in other words, whether the act of Casserly in starting the fire was such a consequence of the defendant's original wrong in allowing the oil to remain upon the platform that the defendant is responsible to the plaintiff for it.

The rule is very often stated that, in law, the proximate, and not the remote, cause is to be regarded; and, in applying this rule, it is sometimes said that the law will not look back from the injurious consequence beyond the last sufficient cause, and especially that, where an intelligent and responsible human being has intervened between the original cause and the resulting damage, the law will not look back beyond him. This ground of exonerating an original wrongdoer may be found discussed or suggested in the following decisions and text-books, among others: *Clifford v. Cotton Mills*, 146 Mass. 47, 15 N. E. 84, 4 Am. St. Rep. 279; *Elmer v. Fessenden*, 151 Mass. 359, 24 N. E. 208, 5 L. R. A. 724; *Hayes v. Inhabitants of Hyde Park*, 153 Mass. 514, 27 N. E. 522, 12 L. R. A. 249; *Freeman v. Accident Ass'n*, 156 Mass. 351, 30 N. E. 1013, 17 L. R. A. 753; *Lynn Gas & Electric Co. v. Meriden Fire Ins. Co.*, 158 Mass. 570, 33 N. E. 690, 20 L. R. A. 297, 35 Am. St. Rep. 540; *Insurance Co. v. Tweed*, 7 Wall. 44, 19 L. Ed. 65; *Railroad Co. v. Kellogg*, 94 U. S. 469, 24 L. Ed. 256; *Railroad Co. v. Hickey*, 166 U. S. 521, 17 Sup. Ct. 661, 41 L. Ed. 1101; *Reiper v. Nichols*, 31 Hun, 491; *Read v. Nichols*, 118 N. Y. 224, 23 N. E. 468, 7 L. R. A. 130; *Mars v. President, etc.*, 54 Hun, 625, 8 N. Y. Supp. 107; *Leavitt v. Railroad Co.*, 89 Me. 509, 36 Atl. 998, 36 L. R. A. 382; *Cuff v. Railroad Co.*, 35

N. J. Law, 17, 10 Am. Rep. 205; *Curtin v. Somerset*, 140 Pa. 70, 21 Atl. 244; *Railroad Co. v. Salmon*, 39 N. J. Law, 299; *Pennsylvania Co. v. Whitlock*, 99 Ind. 16, 50 Am. Rep. 71; *Goodlander Mill Co. v. Standard Oil Co.*, 11 C. C. A. 253, 63 Fed. 400, 405, 27 L. R. A. 583; *Shear. & R. Neg.* §§ 38, 666; *Whart. Neg.* § 134 et seq. It cannot, however, be considered that in all cases the intervention even of a responsible and intelligent human being will absolutely exonerate a preceding wrongdoer. Many instances to the contrary have occurred, and these are usually cases where it has been found that it was the duty of the original wrongdoer to anticipate and provide against such intervention, because such intervention was a thing likely to happen in the ordinary course of events. Such was the case of *Lane v. Atlantic Works*, 111 Mass. 136, where it was found by the jury that the meddling of young boys with a loaded truck left in a public street was an act which the defendants ought to have apprehended and provided against, and the verdict for the plaintiff was allowed to stand. In the carefully expressed opinion by Mr. Justice Colt the court say: "In actions of this description the defendant is liable for the natural and probable consequences of his negligent act or omission. The injury must be the direct result of the misconduct charged; but it will not be considered too remote if, according to the usual experience of mankind, the result ought to have been apprehended. The act of a third person, intervening or contributing a condition necessary to the injurious effect of the original negligence, will not excuse the first wrongdoer, if such act ought to have been foreseen. The original negligence still remains a culpable and direct cause of the injury. The test is to be found in the probable injurious consequences which were to be anticipated, not in the number of subsequent events and agencies which might arise." According to this statement of the law, the questions in the present case are: Was the starting of the fire by Casserly the natural and probable consequence of the defendant's negligent act in leaving the oil upon the platform? According to the usual experience of mankind, ought this result to have been apprehended? The question is not whether it was a possible consequence, but whether it was probable; that is, likely to occur, according to the usual experience of mankind. That this is the true test of responsibility, applicable to a case like this, has been held in very many cases, according to which a wrongdoer is not responsible for a consequence which is merely possible, according to occasional experience, but only for a consequence which is probable, according to ordinary and usual experience. One is bound to anticipate and provide against what usually happens and what is likely to happen; but it would impose too heavy a responsibility to hold him bound in like manner to guard against what is unusual and unlikely to happen, or what, as it is sometimes said, is only remotely and slightly probable. A high degree of caution might, and perhaps

would, guard against injurious consequences which are merely possible; but it is not negligence, in a legal sense, to omit to do so. There may not always have been entire consistency in the application of this doctrine; but, in addition to cases of boys meddling with things left in a public street, courts have also held it competent for a jury to find that the injury was probable, although brought about by a new agency, when heavy articles left near an opening in the floor of an unfinished building, or in the deck of a vessel, were accidentally jostled so that they fell upon persons below (*McCauley v. Norcross*, 155 Mass. 584, 30 N. E. 464; *The Joseph B. Thomas* [D. C.] 81 Fed. 578); when sheep, allowed to escape from a pasture, and stray away in a region frequented by bears, were killed by the bears (*Gilman v. Noyes*, 57 N. H. 627); and when a candle or match was lighted by a person in search of a gas leak, with a view to stop the escape of gas (*Koelsch v. Philadelphia Co.*, 152 Pa. 355, 25 Atl. 522, 18 L. R. A. 759, 34 Am. St. Rep. 653); and in other cases not necessary to be specially referred to. In all of these cases the real ground of decision has been that the result was or might be found to be probable, according to common experience. Without dwelling upon other authorities in detail, we will mention some of those in which substantially this view of the law has been stated: *Davidson v. Nichols*, 11 Allen, 514; *McDonald v. Snelling*, 14 Allen, 290, 92 Am. Dec. 768; *Tutein v. Hurley*, 98 Mass. 211, 93 Am. Dec. 154; *Hoadley v. Transportation Co.*, 115 Mass. 304, 15 Am. Rep. 106; *Hill v. Winsor*, 118 Mass. 251; *Derry v. Flitner*, Id. 131; *Freeman v. Accident Ass'n*, 156 Mass. 351, 30 N. E. 1013, 17 L. R. A. 753; *Spade v. Railroad Co.*, 168 Mass. 285, 47 N. E. 88, 38 L. R. A. 512, 60 Am. St. Rep. 393, and cases there cited; *Cosulich v. Oil Co.*, 122 N. Y. 118, 25 N. E. 259, 19 Am. St. Rep. 475; *Rhodes v. Dunbar*, 57 Pa. 274, 98 Am. Dec. 221; *Hoag v. Railroad*, 85 Pa. 293, 27 Am. Rep. 653; *Behling v. Pipe Lines*, 160 Pa. 359, 28 Atl. 777, 40 Am. St. Rep. 724; *Goodlander Mill Co. v. Standard Oil Co.*, 11 C. C. A. 253, 63 Fed. 400, 405, 406, 27 L. R. A. 583; *Haile's Curator v. Railway Co.*, 9 C. C. A. 134, 60 Fed. 557, 23 L. R. A. 774; *Clark v. Chambers*, 3 Q. B. Div. 327; *Whart. Neg.* (2d Ed.) §§ 74, 76, 78, 138-145, 155, 955; *Cooley, Torts*, \*69, \*70; *Add. Torts*, \*40; *Pol. Torts*, \*388; *Mayne, Dam.* \*39, \*47, \*48. For a recent English case involving a case of remoteness, see *Engelhart v. Farrant* [1897] 1 Q. B. 240. The rule exempting a slanderer from damages caused by repetition of his words rests on the same ground. *Hastings v. Stetson*, 126 Mass. 329, 30 Am. Rep. 683; *Shurtleff v. Parker*, 130 Mass. 293, 39 Am. Rep. 454; *Elmer v. Fessenden*, 151 Mass. 359, 24 N. E. 208, 5 L. R. A. 724.

Tried by this test, the defendant is not responsible for the consequences of Casserly's act. There was no close connection between it and the defendant's negligence. There was nothing to show that such a consequence had ever happened before, during the eight years

covered by the plaintiff's testimony, or that there were any exciting circumstances which made it probable that it would happen. It was, of course, possible that some careless person might come along, and throw down a lighted match, where a fire would be started by it. This might, indeed, have happened upon the plaintiff's own premises, or in any other place where inflammable materials were gathered. But it was not according to the usual and ordinary course of events. In failing to anticipate and guard against such an occurrence or accident, the defendant violated no legal duty which it owed to the plaintiff. What qualification, if any, of this doctrine, should be made in case of the storage of high explosives, like gunpowder and dynamite, we do not now consider. See *Rudder v. Koopmann*, 116 Ala. 332, 22 South. 601, 37 L. R. A. 489; *Kinney v. Koopmann*, 116 Ala. 310, 22 South. 593, 37 L. R. A. 497, 67 Am. St. Rep. 119, and cases there cited; *Rhodes v. Dunbar*, 57 Pa. 274, 290, 98 Am. Dec. 221.

The plaintiff, however, contends that this question should have been submitted to the jury. This course would have been necessary if material facts had been in dispute. But where, upon all the evidence, the court is able to see that the resulting injury was not probable, but remote, the plaintiff fails to make out his case, and the court should so rule, the same as in cases where there is no sufficient proof of negligence. *McDonald v. Snelling*, 14 Allen, 290, 299, 92 Am. Dec. 768. It is common practice to withdraw cases from the jury on the ground that the damages are too remote. *Hammond Co. v. Bussey*, 20 Q. B. Div. 79, 89; *Read v. Nichols*, 118 N. Y. 224, 23 N. E. 468, 7 L. R. A. 130; *Cuff v. Railroad Co.*, 35 N. J. Law, 17, 10 Am. Rep. 205; *Behling v. Pipe Lines*, 160 Pa. 359, 28 Atl. 777, 40 Am. St. Rep. 724; *Goodlander Mill Co. v. Standard Oil Co.*, 11 C. C. A. 253, 63 Fed. 400, 405, 406, 27 L. R. A. 583; *Pennsylvania Co. v. Whitlock*, 99 Ind. 16, 50 Am. Rep. 71; *Carter v. Towne*, 103 Mass. 507; *Hoadley v. Transportation Co.*, 115 Mass. 304, 15 Am. Rep. 106; *Hutchinson v. Gaslight Co.*, 122 Mass. 219; *Elmer v. Fessenden*, 151 Mass. 359, 24 N. E. 208, 5 L. R. A. 724.

The plaintiff further contends that the negligence of the defendant in keeping the oil upon the platform was concurrent with the careless act of Casserly, and that, therefore, it was a case where two wrongdoers, acting at the same time, contributed to the injurious result. But this is not a just view of the matter. The negligence of the defendant preceded that of Casserly, and was an existing fact when he intervened, just as in *Lane v. Atlantic Works*, 111 Mass. 136, the negligence of the defendants in leaving their loaded truck in the street preceded that of the boys who meddled with it.

Without considering other grounds urged by the defendant, a majority of the court is of opinion that, upon the evidence, the defendant was not bound, as a matter of legal duty, to anticipate and guard against an act like that of Casserly, he being a stranger com-

ing upon the defendant's premises for his own purposes and in his own right. Exceptions overruled.

(See, also, *Mahogany v. Ward*, 16 R. I. 479, 17 Atl. 860, 27 Am. St. Rep. 753; *Goodlander Mill Co. v. Standard Oil Co.*, 63 Fed. 400, 11 C. C. A. 253, 27 L. R. A. 583. It is frequently held, as in the case of *Milwaukee, etc., R. Co. v. Kellogg*, 94 U. S. 469, 24 L. Ed. 256, that the question whether a cause is proximate or remote is ordinarily for the jury to decide. But where the evidence is such as to leave no room for difference of opinion among reasonable men that the cause is proximate, or that it is remote, it is common practice for the court to decide the matter. *Cole v. German Sav., etc., Society*, 124 Fed. 113, 59 C. C. A. 593; *Mo. Pac. R. Co. v. Columbia*, 65 Kan. 390, 69 Pac. 338, 58 L. R. A. 399; *Schumaker v. St. Paul, etc., R. Co.*, 46 Minn. 39, 48 N. W. 559, 12 L. R. A. 257; *Van Inwegen v. Port Jervis, etc., R. Co.*, 165 N. Y. 625, 58 N. E. 878; 21 Am. & Eng. Enc. of Law [2d Ed.] 508, 509.

When an injury is the result of two concurrent causes, the party responsible for one of these causes is not exempt from liability because the person who is responsible for the other cause may be equally liable. *Lake v. Milliken*, 62 Me. 240, 16 Am. Rep. 456; *Murray v. Boston Ice Co.*, 180 Mass. 165, 61 N. E. 1001; *Ring v. City of Cohoes*, 77 N. Y. 83, 33 Am. Rep. 574; *Slater v. Mersereau*, 64 N. Y. 138; *Cooley on Torts* [2d Ed.] 89, 90.)

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### (3 Q. B. Div. 327.)

#### CLARK v. CHAMBERS.

(Queen's Bench Division. April 15, 1878.)

#### NEGLIGENCE—PROXIMATE OR REMOTE CONSEQUENCES.

Land used by defendant as a place for athletic sports abutted on a private road, consisting of a carriage-way and footway, and leading also to premises of others. To prevent persons driving vehicles up to the fence surrounding his premises, and overlooking the sports, defendant placed a barrier across the road, but left in the middle of the carriage-way a space through which vehicles could pass, which was closed by a pole at times when the sports were going on. A part of the barrier, armed with spikes, was removed from the carriage-way by some person other than defendant, without his authority, and was placed in an upright position across the footpath. Plaintiff, passing along the road at night, from one of the houses to which it led, passed safely, feeling his way, through the opening in the middle of the barrier, and, being wholly unaware that there was any obstruction on the footpath, as it was much too dark to see, turned towards it, and his eye came into contact with one of the spikes, and was injured. In an action by him against defendant therefor, it was admitted that the erection of the barrier by defendant was wrongful; and that plaintiff was lawfully using the road; and the jury found that the use of that part of the barrier armed with spikes was dangerous to persons using the road. *Held*, that defendant was liable for the injury so occasioned to plaintiff, notwithstanding the fact that the immediate cause of the accident was the act of another, in removing the dangerous instrument from the carriage-way, where defendant had placed it, to the footpath.

#### Reserved Case.

Action by Clark against Chambers for personal injuries to plaintiff, alleged to have been caused by defendant's negligence. At the trial,

before the lord chief justice, the case was reserved for further consideration.

Argued before COCKBURN, C. J., and MANISTY, J.

COCKBURN, C. J. This is a case of considerable nicety, and which, so far as the precise facts are concerned, presents itself for the first time. The defendant is in the occupation of premises which abut on a private road leading to certain other premises as well as to his; it consists of a carriage-road and a footway. The soil of both is the property of a different owner; the defendant has no interest in it beyond the right of way to and from his premises. The defendant uses his premises as a place where athletic sports are carried on by persons resorting thereto for that purpose for their own amusement. His customers, finding themselves annoyed by persons coming along the road in question in carts and vehicles, and stationing themselves opposite to his grounds and overlooking the sports, the height of the carts and vehicles enabling them to see over the fence, the defendant erected a barrier across the road for the purpose of preventing vehicles from getting as far as his grounds. This barrier consisted of a hurdle set up lengthways next to the footpath; then two wooden barriers armed with spikes, commonly called "chevaux-de-frise;" then there was left an open space through which a vehicle could pass; then came another large hurdle, set up lengthways, which blocked up the rest of the road. At ordinary times, the space between the two divisions of the barrier was left open for vehicles to pass which might be going to any of the other premises to which the road in question led. But, at the times when the sports were going on, a pole attached by suitable apparatus was carried across from the one part of the barrier to the other, and so the road was effectually blocked. Among the houses and grounds to which this private road led was that of a Mr. Bruen. On the evening on which the accident which gave rise to the present action occurred, the plaintiff, who occupied premises in the immediate neighborhood, accompanied Mr. Bruen, by the invitation of the latter, to Bruen's house. It was extremely dark, but, being aware of the barrier and the opening in it, they found the opening, the pole not being set across it, and passed through it in safety; but on his return, later in the evening, the plaintiff was not equally fortunate. It appears that, in the course of that day or the day previous, some one had removed one of the chevaux-de-frise hurdles from the place where it had stood, and had placed it in an upright position across the footpath. Coming back along the middle of the road, the plaintiff, feeling his way, passed safely through the opening in the center of the barrier; having done which, being wholly unaware, it being much too dark to see, that there was any obstruction on the footpath, he turned onto the latter, intending to walk along it the rest of the way. He had advanced only two or three steps, when his eye came into collision with one of the spikes, the effect of which was that the eye was forced out of its socket. It did

not appear by whom the chevaux-de-frise hurdle had been thus removed, but it was expressly found by the jury that this was not done by the defendant or by his authority. The question is whether the defendant can be held liable for the injury thus occasioned. It is admitted that what the defendant did in erecting this barrier across the road was unauthorized and wrongful, and it is not disputed that the plaintiff was lawfully using the road. There is no ground for imputing to him any negligence contributing to the accident. The jury have expressly found, in answer to a question put to them by me, that the use of the chevaux-de-frise in the road was dangerous to the safety of persons using it. The ground of defense in point of law taken at the trial and on the argument on the rule was that, although, if the injury had resulted from the use of the chevaux-de-frise hurdle, as placed by the defendant on the road, the defendant, on the facts as admitted or as found by the jury, might have been liable, yet, as the immediate cause of the accident was not the act of the defendant, but that of the person, whoever he may have been, who removed the spiked hurdle from where the defendant had fixed it, and placed it across the footway, the defendant could not be held liable for an injury resulting from the act of another. On the part of the plaintiff it was contended that, as the act of the defendant in placing a dangerous instrument on the road had been the primary cause of the evil, by affording the occasion for its being removed and placed on the footpath, and so causing the injury to the plaintiff, he was responsible in law for the consequences.

Numerous authorities were cited in support of this position. The first is the case of *Scott v. Shepherd*, 3 Wils. 403, 2 W. Bl. 892. In that case the defendant threw a lighted squib into a market-house where several persons were assembled. It fell upon a standing, the owner of which, in self-defense, took it up and threw it across the market-house. It fell upon another standing, the owner of which, in self-defense, took it up and threw it to another part of the market-house, and in its course it struck the plaintiff, and exploded, and put out his eye. The defendant was held liable, although, without the intervention of a third person, the squib would not have injured the plaintiff.

In *Dixon v. Bell*, 5 Maule & S. 198, the defendant, having left a loaded gun with another man, sent a young girl to fetch it, with a message to the man in whose custody it was to remove the priming, which the latter, as he thought, did, but, as it turned out, did not do effectually. The girl brought it home, and thinking that, the priming having been removed, the gun could not go off, pointed it at the plaintiff's son, a child, and pulled the trigger. The gun went off, and injured the child. The defendant was held liable, "as by this want of care," says Lord Ellenborough,—that is, by leaving the gun without drawing the charge or seeing that the priming had been properly removed,—“the instrument was left in a state capable of doing mis-

chief, the law will hold the defendant responsible. It is a hard case, undoubtedly, but I think the action is maintainable."

In *Ilott v. Wilkes*, 3 Barn. & Ald. 304,—the well-known case as to spring-guns,—it became necessary to determine how far a person setting spring-guns would be liable to a person injured by such a gun going off, even though such person were a trespasser, inasmuch as the plaintiff, having had notice that spring-guns were set in a particular wood, had voluntarily exposed himself to the danger. But both Mr. Justice Bayley and Mr. Justice Holroyd appear to have thought that without such notice the action would have lain, the use of such instruments being unreasonably disproportioned to the end to be obtained, and dangerous to the lives of persons who might be innocently trespassing. Looking to their language, it can scarcely be doubted that if, instead of injuring the plaintiff, the gun which he caused to go off had struck a person passing lawfully along a path leading through the wood, they would have held the defendant liable.

In *Jordin v. Crump*, 8 Mees. & W. 782, the use of dog-spears was held not illegal; but there the injury done to the plaintiff's dog was alone in question. If the use of such an instrument had been productive of injury to a human being, the result might have been different.

In *Illidge v. Goodwin*, 5 Car. & P. 192, the defendant's cart and horse were left standing in the street without any one to attend to them. A person passing by whipped the horse, which caused it to back the cart against the plaintiff's window. It was urged that the man who whipped the horse, and not the defendant, was liable. It was also contended that the bad management of the plaintiff's shopman had contributed to the accident. But Tindal, C. J., ruled that, even if this were believed, it would not avail as a defense. "If," he says, "a man chooses to leave a cart standing on the street, he must take the risk of any mischief that may be done."

*Lynch v. Nurdin*, 1 Q. B. 29, is a still more striking case. There, as in the former case, the defendant's cart and horse had been left standing unattended in the street. The plaintiff, a child of seven years of age, playing in the street with other boys, was getting into the cart when another boy made the horse move on. The plaintiff was thrown down, and the wheel of the cart went over his leg and fractured it. A considered judgment was delivered by Lord Denman. He says: "It is urged that the mischief was not produced by the mere negligence of the servant as asserted in the declaration, but, at most, by that negligence in combination with two other active causes,—the advance of the horse in consequence of his being excited by the other boy, and the plaintiff's improper conduct in mounting the cart, and committing a trespass on the defendant's chattel. On the former of these two causes no great stress was laid, and I do not apprehend that it can be necessary to dwell on it at any length. For if I am guilty of negligence in leaving anything dangerous where I know it to be extremely probable that some other person will unjustifiably set

it in motion to the injury of a third, and if that injury should be so brought about, I presume that the sufferer might have redress by action against both or either of the two, but unquestionably against the first." And then, by way of illustration, the chief justice puts the case of a gamekeeper leaving a loaded gun against the wall of a play-ground where school-boys were at play, and one of the boys in play letting it off and wounding another. "I think it will not be doubted," says Lord Denman, "that the game-keeper must answer in damages to the wounded party." "This," he adds, "might possibly be assumed as clear in principle, but there is also the authority of the present chief justice of the common pleas in its support in *Illidge v. Goodwin*, 5 Car. & P. 190." It is unnecessary to follow the judgment in the consideration of the second part of the case, namely, whether the plaintiff, having contributed to the accident by getting into the cart, was prevented from recovering in the action, as no such question arises here.

In *Daniels v. Potter*, 4 Car. & P. 262, the defendants had a cellar opening to the street. The flap of the cellar had been set back while the defendant's men were lowering casks into it, as the plaintiffs contended, without proper care having been taken to secure it. The flap fell, and injured the plaintiff. The defendant maintained that the flap had been properly fastened, but also set up as a defense that its fall had been caused by some children playing with it. But the only question left to the jury by Tindal, C. J., was whether the defendant's men had used reasonable care to secure the flap. His direction implies that in that case only would the intervention of a third party causing the injury be a defense. The cases of *Hughes v. Macfie*, 2 Hurl. & C. 744, 33 Law J. Exch. 177, and *Abbott v. Macfie*, Id.; two actions arising out of the same circumstances, and tried in the passage court at Liverpool, though at variance with some of the foregoing, so far as relates to the effect on the plaintiff's right to recover where his own act as a trespasser has contributed to the injury of which he complains, is in accordance with them as respects the defendants' liability for his own act, where that act is the primary cause, though the act of another may have led to the immediate result. The defendants had a cellar opening to the street. Their men had taken up the flap of the cellar for the purpose of lowering casks into it, and having reared it against the wall nearly upright with its lower face, on which there were cross-bars, towards the street, had gone away. The plaintiff in one of the actions, a child five years old, got upon the cross-bars of the flap, and in jumping off them brought down the flap on himself and another child, the plaintiff in the other action, and both were injured. It was held that, while the plaintiff whose act had caused the flap to fall could not recover, the other plaintiff who had been injured could, provided he had not been playing with the other so as to be a joint actor with him.

*Bird v. Holbrook*, 4 Bing. 628, is another striking case, as there the plaintiff was undoubtedly a trespasser. The defendant being the

owner of a garden, which was at some distance from his dwelling-house, and which was subject to depredations, had set in it without notice a spring-gun for the protection of his property. The plaintiff, who was not aware that a spring-gun was set in the garden, in order to catch a peafowl, the property of a neighbor, which had escaped into the garden, got over the wall, and his foot coming, in his pursuit of the bird, into contact with the wire which communicated with the gun, the latter went off and injured him. It was held, though his own act had been the immediate cause of the gun going off, yet that the unlawful act of the defendant in setting it rendered the latter liable for the consequences.

In the course of the discussion the similar case of *Jay v. Whitfield*, at page 644, 4 Bing., (cited in 3 Barn. & Ald. 308,) was mentioned,—tried before Richards, C. B.,—in which a plaintiff who had trespassed upon premises in order to cut a stick, and had been similarly injured, had recovered substantial damages, and no attempt had been made to disturb the verdict.

In *Hill v. New River Co.*, 9 Best & S. 303, the defendants created a nuisance in a public highway by allowing a stream of water to spout up open and unfenced in the road. The plaintiff's horses, passing along the road with his carriage, took fright at the water thus spouting up, and swerved to the other side of the road. It so happened that there was in the road an open ditch or cutting, which had been made by contractors who were constructing a sewer, and which had been left unfenced and unguarded, which it ought not to have been. Into this ditch or cutting, owing to its being unfenced, the horses fell, and injured themselves and the carriage. It was contended that the remedy, if any, was against the contractors; but it was held that the plaintiff was entitled to recover against the company.

In *Burrows v. Coker Co.*, L. R. 7 Exch. 96, it was held in the exchequer chamber, affirming a judgment of the court of exchequer, that where, through a breach of contract by the defendants in not serving the plaintiff with a proper pipe to convey gas from their main into his premises, an escape of gas had taken place, whereupon, the servant of a gas-fitter at work on the premises having gone into the part of the premises where the escape had occurred, with a lighted candle, and examined the pipe with the candle in his hand, an explosion took place, by which the premises were injured, the defendants were liable, though the explosion had been immediately caused by the imprudence of the gas-fitter's man in examining the pipe with a lighted candle in his hand.

In *Collins v. Commissioners*, L. R. 4 C. P. 279, the defendants were bound, under an act of parliament, to construct a cut with proper walls, gates, and sluices, to keep out the waters of a tidal river, and also a culvert under the cut, to carry off the drainage of the lands lying east of the cut, and to keep the same open at all times. In consequence of the defective construction of the gates and sluices, the waters of the river flowed into the cut, and, bursting its western bank,

flooded the adjoining lands. The plaintiff and other proprietors on the eastern side closed the culvert, and so protected their lands; but the proprietors on the western side, to lessen the evil to themselves, reopened the culvert, and so increased the overflow on the plaintiffs' land, and caused injury to it. The defendants sought to ascribe the injury to the act of the western proprietors in removing the obstruction which those on the other side had placed at the culvert. But it was held that the negligence of the defendants was the substantial cause of the mischief. "The defendants," says Mr. Justice Montague Smith, "cannot excuse themselves from the natural consequences of their negligence by reason of the act, whether rightful or wrongful, of those who removed the obstruction placed in the culvert under the circumstances found in this case." "The primary and substantial cause of the injury," says Mr. Justice Brett, "was the negligence of the defendants, and it is not competent to them to say that they are absolved from the consequences of their wrongful act by what the plaintiff or some one else did." "I cannot see how the defendants can excuse themselves by urging that the plaintiff was prevented by other wrong-doers from preventing a part of the injury."

The case of *Harrison v. Railway Co.*, 3 Hurl. & C. 231, 33 Law J. Exch. 266, belongs to the same class. The defendants were bound, under an Act of Parliament, to maintain a delph or drain with banks for carrying off water for the protection of the adjoining lands. At the same time certain commissioners, appointed under an Act of Parliament, were bound to maintain the navigation of the river Witham, with which the delph communicated. There having been an extraordinary fall of rain, the water in the delph rose nearly to the height of its banks, when one of them gave way, and caused the damage of which the plaintiff complained. It was found that the bank of the delph was not in a proper condition; but it was also found, and it was on this that the defendants relied as a defense, that the breaking of the bank had been caused by the water in it having been penned back, owing to the neglect of the commissioners to maintain in a proper state certain works which it was their duty to keep up under their Act. Nevertheless the defendants were held liable.

These authorities would appear to be sufficient to maintain the plaintiff's right of action under the circumstances of this case. It must, however, be admitted that in one or two recent cases the courts have shown a disposition to confine the liability arising from unlawful acts, negligence, or omissions of duty within narrower limits, by holding a defendant liable for those consequences only which, in the ordinary course of things, were likely to arise, and which might therefore reasonably be expected to arise, or which it was contemplated by the parties might arise, from such acts, negligence, or omissions. In *Greenland v. Chaplin*, 5 Exch. 243, at page 248, Pollock, C. B., says: "I entertain considerable doubt whether a person who is guilty of negligence is responsible for all the consequences which may under any circumstances arise, and in respect of mischief which could by no

possibility have been foreseen, and which no reasonable person would have anticipated." Acting on this principle, the court of common pleas, in the recent case of *Sharp v. Powell*, L. R. 7 C. P. 253, held that the action would not lie where the injury, though arising from the unlawful act of the defendant, could not have been reasonably expected to follow from it. The defendant had, contrary to the provisions of the police act, washed a van in the street, and suffered the water used for the purpose to flow down a gutter towards a sewer at some little distance. The weather being frosty, a grating, through which water flowing down the gutter passed into the sewer, had become frozen over, in consequence of which the water sent down by the defendant, instead of passing into the sewer, spread over the street and became frozen, rendering the street slippery. The plaintiff's horse, coming along, fell in consequence, and was injured. It was held that, as there was nothing to show that the defendant was aware of the obstruction of the grating, and as the stoppage of the water was not the necessary or probable consequence of the defendant's act, he was not responsible for what had happened. Bovill, C. J., there says: "No doubt one who commits a wrongful act is responsible for the ordinary consequences which are likely to result therefrom, but, generally speaking, he is not liable for damage which is not the natural or ordinary consequence of such act, unless it be shown that he knows, or has reasonable means of knowing, that consequences not usually resulting from the act are, by reason of some existing cause, likely to intervene so as to occasion damage to a third person. Where there is no reason to expect it, and no knowledge in the person doing the wrongful act that such a state of things exists as to render the damage probable, if injury does result to a third person it is generally considered that the wrongful act is not the proximate cause of the injury so as to render the wrong-doer liable to an action." And Grove, J., said: "I am entirely of the same opinion. I think the act of the defendant was not the ordinary or proximate cause of the damage to the plaintiff's horse, or within the ordinary consequences which the defendant may be presumed to have contemplated or for which he is responsible. The expression, the 'natural' consequence, which has been used in so many cases, and which I myself have, no doubt, often used, by no means conveys to the mind an adequate notion of what is meant; 'probable' would perhaps be a better expression. If, on the present occasion, the water had been allowed to accumulate round the spot where the washing of the van took place, and had there frozen obviously within the sight of the defendant, and the plaintiff's horse had fallen there, I should have been inclined to think that the defendant would have been responsible for the consequences which had resulted." And Mr. Justice Keating said: "The damage did not immediately flow from the wrongful act of the defendant, nor was such a probable or likely result as to make him responsible for it. The natural consequence, if that be a correct expression, of the wrongful act of the defendant, would have been that the water would, under

ordinary circumstances, have flowed along the gutter or channel, and so down the grating to the sewer. The stoppage and accumulation of the water was caused by ice or other obstruction at the drain, not shown to have been known to the defendant, and for which he was in no degree responsible. That being so, it would obviously be unreasonable to trace the damage indirectly back to the defendant."

We acquiesce in the doctrine thus laid down as applicable to the circumstances of the particular case, but we doubt its applicability to the present, which appears to us to come within the principle of *Scott v. Shepherd*, 3 Wils. 403, 2 W. Bl. 892, and *Dixon v. Bell*, 5 Maule & S. 198, and the other cases to which we have referred. At the same time, it appears to us that the case before us will stand the test thus said to be the true one. For a man who unlawfully places an obstruction across either a public or a private way may anticipate the removal of the obstruction, by some one entitled to use the way, as a thing likely to happen; and, if this should be done, the probability is that the obstruction so removed will, instead of being carried away altogether, be placed somewhere near. Thus, if the obstruction be to the carriage-way, it will very likely be placed, as was the case here, on the footpath. If the obstruction be a dangerous one, wheresoever placed, it may, as was the case here, become a source of damage, from which, should injury to an innocent party occur, the original author of the mischief should be held responsible. Moreover, we are of opinion that, if a person places a dangerous obstruction in a highway or in a private road, over which persons have a right of way, he is bound to take all necessary precaution to protect persons exercising their right of way, and that if he neglects to do so he is liable for the consequences. It is unnecessary to consider how the matter would have stood had the plaintiff been a trespasser. The case of *Mangan v. Atterton*, 4 Hurl. & C. 388, L. R. 1 Exch. 239, was cited before us as a strong authority in favor of the defendant. The defendant had there exposed in a public market-place a machine for crushing oil-cake without it being thrown out of gear, or the handle being fastened, or any person having the care of it. The plaintiff, a boy of four years of age, returning from school with his brother, a boy of seven, and some other boys, stopped at the machine. One of the boys began to turn the handle. The plaintiff, at the suggestion of his brother, placed his hand on the cogs of the wheels, and, the machine being set in motion, three of his fingers were crushed. It was held by the court of exchequer that the defendant was not liable—First, because there was no negligence on the part of the defendant, or, if there was negligence, it was too remote; and, secondly, because the injury was caused by the act of the boy who turned the handle, and of the plaintiff himself, who was a trespasser. With the latter ground of the decision we have in the present case nothing to do; otherwise we should have to consider whether it should prevail against the cases cited, with which it is obviously in conflict. If the decision as to negligence is in conflict with our judgment in

this case, we can only say we do not acquiesce in it. It appears to us that a man who leaves in a public place, along which persons, and among them children, have to pass, a dangerous machine, which may be fatal to any one who touches it, without any precaution against mischief, is not only guilty of negligence, but of negligence of a very reprehensible character, and not the less so because the imprudent and unauthorized act of another may be necessary to realize the mischief to which the unlawful act or negligence of the defendant has given occasion. But, be this as it may, that case cannot govern the present; for the decision proceeded expressly on the ground that there had been no default in the defendant; here it cannot be disputed that the act of the defendant was unlawful. On the whole, we are of opinion, both on principle and authority, that the plaintiff is entitled to our judgment.

Judgment for the plaintiff.

(Analogous cases of special interest are *Halestrap v. Gregory* [1895] 1 Q. B. 561; *McDowall v. Gt. West. R. Co.* [1903] 2 K. B. 331; *Engelhart v. Farrant* [1897] 1 Q. B. 240; *Parker v. Cohoes*, 10 Hun, 531, affirmed 74 N. Y. 610; *McDonald v. Snelling*, 14 Allen, 290, 92 Am. Dec. 768; *McCauley v. Norcross*, 155 Mass. 584, 30 N. E. 464; *Babbitt v. Safety Fund Nat. Bk.*, 169 Mass. 361, 47 N. E. 1018; *Henry v. Dennis*, 93 Ind. 452, 47 Am. Rep. 378; *Binford v. Johnston*, 82 Ind. 426, 42 Am. Rep. 508. In this last case a dealer sold to two boys, aged ten and twelve years, cartridges loaded with powder and ball, for use in a toy pistol, and instructed the boys in their use. The boys afterwards left the toy pistol loaded with one of the cartridges on the floor of their home, where a younger brother, aged six years, picked it up and discharged it, the ball wounding one of the older brothers and causing his death. It was held that an action would lie against the dealer.)

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(5 Cow. 351.)

MOODY v. BAKER (in part).

(Supreme Court of New York. February Term, 1826.)

**SLANDER—SPECIAL DAMAGE—BREAKING OFF MARRIAGE AS PROXIMATE RESULT.**

An action may be maintained for words spoken of plaintiff by defendant, charging her with unchaste conduct, to a man to whom she was engaged to be married, by reason of which accusation the man broke the engagement, although such words are not in themselves actionable, and although plaintiff has a remedy against the man engaged to her for breach of the contract to marry.

Motions in arrest of judgment and for a new trial.

Action for slander. The declaration alleged a contract of marriage between plaintiff and one Parkman Baker; that defendant, to prevent such intended marriage, stated to said Parkman Baker that he had carnal intercourse with plaintiff, by reason whereof said Parkman Baker refused to marry plaintiff. The jury found a verdict for plaintiff. Defendant moved in arrest of judgment, on the ground that the declaration was insufficient.

BY THE COURT, *per* WOODWORTH, J. The words spoken are not in themselves actionable. If the action is sustainable, it must be on the ground of special damage. It is contended on the part of the defendant that no action can be maintained on the facts alleged in the declaration. The case of *Vicars v. Wilcocks*, 8 East, 1, is relied on as an authority in point. In that case it was held that, when special damage is necessary to sustain an action for slander, it is not sufficient to prove a mere wrongful act of a third person, induced by the slander, but the special damage must be a legal and natural consequence of the words spoken. It appeared that in consequence of speaking the words the plaintiff had been dismissed from his employment before the end of the term for which he had contracted. Lord Ellenborough proceeded on the ground that this was an illegal consequence,—a mere wrongful act of the master, for which the defendant was not answerable,—and inquired whether any case could be mentioned of an action of this sort sustained by proof only of an injury by the tortious act of a third person. If the doctrine here advanced is well founded, it disposes of the case before us. The learned judge does not refer to any authority in support of the decision. In my view, it seems to be a departure from well-established principles, applicable to this species of action. *Morris v. Langdale*, 2 Bos. & P. 284, was cited on the argument as supporting the doctrine laid down by Lord Ellenborough. The plaintiff in that case stated that he was a dealer in the funds, and as such had been accustomed to contract; that the defendant said of him, as such dealer, "He is a lame duck," in consequence of which divers persons refused to fulfill their contracts with him, and he was prevented from fulfilling his contracts with other persons. It was held that it did not sufficiently appear either that the words were spoken of lawful contracts, or that the plaintiff was a lawful dealer in the funds, and that the declaration was therefore bad. Part of the gravamen was that divers persons refused to fulfill their contracts. If the test is that the special damage must be the legal and natural consequence of the words spoken, and that the plaintiff is not entitled to recover because he had a right of action on his contract, it is surprising that this ground had not been taken by the counsel who argued. But it is not even suggested. The opinion of the court also seems to be placed on other grounds. It is true, Lord Eldon observed that a doubt had arisen in the mind of the court whether the special damage had been so laid as to support the action, and that, if the plaintiff had sustained any damage in consequence of the refusal of any persons to perform their lawful contracts with him, it is damage which may be compensated in actions brought by the plaintiff against those persons. These remarks were not necessary to the decision of the cause. Admitting them, however, to be correct, the case was not like the present. If persons had refused to fulfill their contracts with the plaintiff, he was entitled to recover damages. The court

probably considered it substantially a contract for the payment of money, in which case the refusal to pay by the debtor in consequence of the speaking of slanderous words would not be a ground of special damage. Most, if not all, the cases for loss of marriage, to be met with in the books, allege a communication or treaty of marriage only, and that the marriage was lost by reason of speaking the words. *Davis v. Gardiner*, 4 Coke, 17; *Southold v. Daunston*, Cro. Car. 269; *Brian v. Cockman*, Id. 322; *Holwood v. Hopkins*, Cro. Eliz. 787.

By a communication or treaty of marriage must, I think, be understood, that the parties had contracted to marry each other. If this had not taken place, how can it be said, correctly, that a marriage was lost? In this case a valid contract of marriage is set out in the declaration. That the action can be maintained will not be questioned, if it be shown that the law has given this remedy in cases analogous and similar in principle. It is a general rule that, where a man has a temporal loss or damage by the wrong of another, he may have an action on the case, to be repaired in damages. 1 Com. Dig. tit. "Action on the Case," A, p. 178. If a party has several remedies for the same thing, he has an election to pursue either. Co. Litt. 145, a. But, after having recovered satisfaction for the injury from one person, he cannot afterwards proceed against any other person for a further satisfaction. *Bird v. Randall*, 3 Burrows, 1345. The case of *Bird v. Randall* was twice argued, and decided after great consideration. The principles recognized and acted upon by the court, if sound, are, in my mind, decisive of the present question. It appeared that one Burford, by articles of agreement, covenanted to serve the plaintiff for five years as a journeyman, and bound himself in the penalty of £100. After continuing a part of the time, the defendant procured and enticed him to depart, which he accordingly did. The plaintiff sued Burford for the penalty, and recovered judgment against him, but the money was not actually paid until after the commencement of the action against the defendant. The question was whether it was maintainable. It is remarkable that the point whether the action could be sustained (inasmuch as the plaintiff had a remedy on the contract) was not even hinted at by the court or counsel. It is manifest that no such notion of the law was then entertained; for Lord Mansfield, who delivered the opinion of the court, observed that the case turned upon two points: (1) Whether the plaintiff could maintain the action if the £100 recovered against the servant had been actually received before the commencement of the action; and, (2) if it could not, whether the receipt of the money subsequently would vary the case. I cannot well conceive of a more perfect recognition that the fact of an existing remedy on the contract formed no objection. All the reasoning of his lordship goes clearly to prove this. The ground upon which he places the decision is that satisfaction had already been received, which implies that, if it had not, there was no obstacle in the way. This case is very

analogous to the one before us. In each there was a contract between the plaintiff and another person, and in each the attempt was to recover damages by proof of an injury sustained by the tortious act of a third person. If, then, the principle recognized in *Bird v. Randall* would authorize a recovery, when there was a contract of service, upon which damages might be recovered, I think it will apply with greater force when there has been a contract of marriage, and performance of it refused in consequence of the slander of the defendant. A contract of marriage looks principally to a specific execution. It is of a very different nature and character from the preventing of the fulfillment of a contract to pay a sum of money. In the latter case, the non-fulfillment of the contract by means of a third person would have no effect on the ability of the contracting party; whereas, in a case of the specific execution of a contract to marry, its value does not depend on the ability of a person to pay damages. It is, indeed, a temporal loss, but of a character not capable of being wholly repaired by the payment of money,—the only substitute the law has devised. But there are other cases which rest on the same principle. If one slanders my title, whereby I am wrongfully disturbed in my possession, though I have a remedy against the disturber, yet I may have an action against him that caused the disturbance. 1 Bac. Abr. tit. "Action on the Case," p. 98; *Newman v. Zachary*, Aleyn, 3. This is equally against the doctrine of Lord Ellenborough, for here damages are given which were caused by the tortious act of a third person. Again, in the action for enticing away another's servant, the servant is always liable, and yet the law is well settled that the seducer is also liable. *Regina v. Callingwood*, 2 Ld. Raym. 1116; *Hart v. Aldridge*, Cowp. 54; *Reeve*, Dom. Rel. 376; 4 Bac. Abr. 593. The doctrine contended for strikes at the root of society, and, in my view, overturns some of the well-settled and revered principles of the common law. I cannot, therefore, doubt that the declaration contains a good cause of action, and that the motion in arrest of judgment should be denied.

Motion denied.

(See *Knight v. Gibbs*, 1 Ad. & El. 43; *Moore v. Stevenson*, 27 Conn. 14; *Paul v. Halferty*, 63 Pa. 46, 50, 3 Am. Rep. 518; *Lumley v. Gye*, 2 E. & B. 216; *Walker v. Cronin*, 107 Mass., at page 567.)

(6 Q. B. Div. 333.)

BOWEN v. HALL et al. (In part).

(Court of Appeal. February 5, 1881.)

## INDUCING BREACH OF CONTRACT—PROXIMATE CONSEQUENCES.

A person who maliciously induces another to break a contract made by the latter with an employer for the employé's exclusive personal services, where such breach would naturally cause, and does in fact cause, injury to the employer, is liable to the employer therefor, even though the relation between the employer and employed may not be, strictly and for all purposes, that of master and servant. The injury in such case is, in law as well as in fact, a natural and probable consequence of the wrongful act. Decision of the majority of the judges in *Lumley v. Gye*, 2 El. & Bl. 216, approved.

## Appeals from Queen's Bench Division.

Action by Edward Bowen as against defendants Hall and Fletcher, for wrongfully enticing away and keeping the other defendant, Pearson, from the plaintiff's employment, and for wrongfully receiving and harboring him after notice of his being the servant of plaintiff; and, as against defendant Pearson, for unlawfully, and against the will of plaintiff, departing from the service of plaintiff. It appeared that plaintiff carried on the business of a brick-maker, and that in June, 1877, defendant Pearson entered into a written contract with plaintiff, whereby defendant agreed, for the consideration of certain prices named, "to find all labor for the whole manufacture, in a workmanlike manner, of best quality white-glazed bricks and baths, (with exception of hooping the baths and preparing the clay mass), in such quantities as you require and when you require," and deliver anywhere they might be required on plaintiff's premises; and also agreed not to engage himself "to any one else for a term of five years;" and plaintiff agreed to the foregoing conditions, and to supply clay for the manufacture of said goods, and also to find all materials (with the exception of body and glaze, which defendant Pearson agreed to find) and tools, "and not engage any one else for the same work for a term of five years." Plaintiff alleged that the manufacture of white-glazed bricks and baths according to said samples was a secret known to defendant Pearson and only a few others, and that defendant Hall, who was a manufacturer of white-glazed bricks and baths in the neighborhood of plaintiff, did not know of the method of manufacture which Pearson used, and that therefore the bricks and baths he manufactured were inferior to those manufactured by Pearson on account of plaintiff. The complaint of plaintiff, for which this action was brought, was that in May, 1878, defendants Hall and Fletcher (the latter being Hall's manager) wrongfully induced Pearson, contrary to his said agreement with plaintiff, to depart from

the exclusive service of plaintiff, and to manufacture on account of the defendant Hall glazed bricks and baths such as he had contracted to manufacture for plaintiff. Plaintiff claimed damages, not against all the defendants, but against only the two defendants, Hall and Fletcher. He also claimed an injunction to restrain these defendants from employing defendant Pearson to do work for them at brick making or glazing, and he claimed an injunction to restrain defendant Pearson from engaging himself to defendants Hall and Fletcher until the expiration of his said contract of service with plaintiff. An interim injunction in the terms claimed was granted by Field, J., as against all the defendants. The action was tried before Manisty, J., who held that there was no evidence to enable plaintiff to maintain his action against defendants Hall and Fletcher, and he therefore directed a verdict to be entered for those defendants; and, as regarded defendant Pearson, the learned judge was of opinion that, as that defendant had not acted or threatened to act contrary to the interim injunction, there was nothing to justify making such injunction perpetual. Plaintiff afterwards applied for and obtained a rule nisi against all the defendants for a new trial. The queen's bench division made such rule absolute as against defendants Hall and Fletcher, but it discharged the rule as to defendant Pearson. Defendants Hall and Fletcher appealed to the court of appeal against the order for a new trial, and there was a cross-appeal by plaintiff against the order discharging the rule as to defendant Pearson.

Argued before Lord SELBORNE, L. C., Lord COLERIDGE, C. J., and BRETT, L. J.

BRETT, L. J. The lord chancellor agrees with me in the judgment I am about to read, and it is to be taken, therefore, as the judgment of the lord chancellor as well as of myself.

In this case, we were of opinion at the hearing that the contract was one for personal service, though not one which established strictly, for all purposes, the relation of master and servant between the plaintiff and Pearson. We were of opinion that there was evidence to justify a finding that Pearson had been induced by the defendants to break his contract of service; that he had broken it, and had thereby, in fact, caused some injury to the plaintiff. We were of opinion that the act of the defendants was done with knowledge of the contract between the plaintiff and Pearson; was done in order to obtain an advantage for one of the defendants at the expense of the plaintiff; was done from a wrong motive, and would therefore justify a finding that it was done in that sense maliciously. There remained, nevertheless, the question whether there was any evidence to be left to the jury against the defendants Hall and Fletcher, it being objected that Pearson was not a servant of the plaintiff. The case was accurately within the authority of the case of *Lumley v. Gye*, 2 El. &

Bl. 216, 22 Law J. Q. B. 463.<sup>1</sup> If that case was rightly decided, the objection in this case failed. The only question, then, which we took time to consider, was whether the decision of the majority of the judges in that case should be supported in a court of error. The decision of the majority will be seen, on a careful consideration of their judgments, to have been founded upon two chains of reasoning. First, that wherever a man does an act which in law and in fact is a wrongful act, and such an act as may, as a natural and probable consequence of it, produce injury to another, and which in the particular case does produce such an injury, an action on the case will lie. This is the proposition to be deduced from the case of *Ashby v. White*, 1 Smith Lead. Cas. (8th Ed.) 264. If these conditions are satisfied, the action does not the less lie because the natural and probable consequence of the act complained of is an act done by a third person; or because such act so done by the third person is a breach of duty or contract by him, or an act illegal on his part, or an act otherwise imposing an actionable liability on him. It has been said that the law implies that the act of the third party, being one which he has free will and power to do or not to do, is his own willful act, and therefore is not the natural or probable result of the defendant's act. In many cases that may be so, but, if the law is so to imply in every case, it will be an implication contrary to manifest truth and fact. It has been said that if the act of the third person is a breach of duty or contract by him, or is an act which it is illegal for him to do, the law will not recognize that it is a natural or probable consequence of the defendant's act. Again, if that were so held in all cases, the law would in some refuse to recognize what is manifestly true in fact. The act complained of in such a case as *Lumley v. Gye*, and which is complained of in the present case, is a persuasion by the defendant of a third person to break a contract existing between such third person and the plaintiff. It cannot be maintained that it is not a natural and probable consequence of that act of persuasion that the third person will break his contract. It is not only the natural and probable consequence, but, by the terms of the proposition which involves the success of the persuasion, it is the actual consequence. Unless there be some technical doctrine to oblige one to say so, it seems impossible to say correctly, in point of fact, that the breach of contract is too remote a consequence of the act of the defendants. The injury is in such a case, in law as well as in fact, a natural and probable consequence of the cause, because it is in fact the consequence of the cause, and there is no technical rule against the truth being recognized. It follows that in *Lumley v. Gye*, and in the present case, all the con-

<sup>1</sup>In this case the plaintiff, a theatrical manager, had engaged Miss Wagner as a singer for a certain time, and defendant maliciously induced her to break her contract and refuse to sing. The defendant was held liable.

ditions necessary to maintain an action on the case are fulfilled. We are therefore of opinion that the judgment of the queen's bench division was correct, and that the principal appeal must be dismissed.

SELBORNE, L. C., added the judgment of the court that the cross-appeal of plaintiff against the order discharging as to the defendant Pearson the rule for a new trial should be allowed, and that there should be a new trial as to all the defendants.

COLERIDGE, C. J., dissented, holding that *Lumley v. Gye*, 2 El. & Bl. 216, Law J. 22 Q. B. 463, should be overruled, and that the action against the defendants Hall and Fletcher was not maintainable; but as to defendant Pearson agreeing with the rest of the court.

Appeal of defendants Hall and Fletcher dismissed; cross-appeal of plaintiff as to defendant Pearson allowed.

(Some dicta in this decision have been omitted, because their soundness has been denied in later English cases. *Allen v. Flood* [1898] A. C., at pages 107, 119, 120, 127, 153, 179; *Quinn v. Leatham* [1901] A. C., at page 509. But the decision itself, upon the question that was at issue, as well as the decision in *Lumley v. Gye*, 2 E. & B. 216, which it followed, has been upheld. *Allen v. Flood* [1898] A. C., at pages 106, 107, 121, 126, 171; *Quinn v. Leatham* [1901] A. C., at pages 510, 535; *Read v. Friendly Society of Stonemasons, etc.*, [1902] 2 K. B., at page 738. There has, however, been considerable discussion in these recent English cases as to whether "malice" is an essential element of the cause of action, and in fact as to what "malice" means in this connection. See *Allen v. Flood*, *passim*; *Quinn v. Leatham*, at page 510; *Read v. Friendly Society*, at page 739. The present statements of English law on this general subject are as follows: "A violation of legal right committed knowingly is a cause of action, and it is a violation of legal right to interfere with contractual relations recognized by law, if there be no sufficient justification for the interference." *Quinn v. Leatham*, at page 510; *Glamorgan Coal Co. v. So. Wales Miners' Federation* [1903] 2 K. B. 545, 573, 576. "The intentional procurement of a violation of individual rights, contractual or other, assuming always that there is no just cause for it," gives a right of action. *Mogul Steamship Co. v. McGregor*, 23 Q. B. D. at p. 614. Hence actions have been sustained in the following cases: Where a society of workmen gave notice to the employers of A as an apprentice that, if the engagement of A were continued, they would call out the workmen who were working for said employers, and who were all members of the society; the employers for this reason discharged A, and he sued the society [*Read v. Friendly Society, etc.* (1902) 2 K. B. 732]; where persons induced the customers of a man to break their contracts with him, and not to deal with him, and thereby caused him damage. *Quinn v. Leatham*, *supra*; *S. P. Glamorgan Coal Co. v. So. Wales Miners' Federation*, *supra*. What will constitute "sufficient justification" for procuring a breach of contract cannot, it is said, be generally defined, but must depend on the facts of each case [*Id.*].

In this country the great weight of authority supports *Lumley v. Gye* and *Bowen v. Hall*, ante 113. Thus, the United States Supreme Court holds that "if one maliciously interferes in a contract between two parties, and induces one of them to break that contract to the injury of the other, the party injured can maintain an action against the wrongdoer." *Angle v. Chicago, etc., R. Co.*, 151 U. S. 1, 14 Sup. Ct. 240, 38 L. Ed. 55. To the same effect are *Moran*

*v. Dunphy*, 177 Mass. 485, 59 N. E. 125, 52 L. R. A. 115, 83 Am. St. Rep. 289; *Jones v. Stanly*, 76 N. C. 355; *Bixby v. Dunlap*, 56 N. H. 456, 22 Am. Rep. 475; *Perkins v. Pendleton*, 90 Me. 166, 38 Atl. 96, 60 Am. St. Rep. 252; *Lucke v. Clothing Cutters', etc.*, 77 Md. 396, 26 Atl. 505, 19 L. R. A. 408, 39 Am. St. Rep. 421; *Chiple v. Atkinson*, 23 Fla. 218, 1 South. 934, 11 Am. St. Rep. 367; *Raymond v. Yarrington*, 96 Tex. 443, 73 S. W. 800, 62 L. R. A. 962; *Raycroft v. Tayntor*, 68 Vt. 219, 223, 35 Atl. 53, 33 L. R. A. 225, 54 Am. St. Rep. 882; *Morgan v. Andrews*, 107 Mich. 33, 64 N. W. 869; *Frank v. Herold*, 63 N. J. Eq. 443, 52 Atl. 152; *Barr v. Essex Trades Council*, 53 N. J. Eq. 101, 117, 30 Atl. 881. "Malice" has been said to exist when defendant's acts were done "without right or justifiable cause" on his part, "with the unlawful purpose to cause damage or loss" to the plaintiff. *Walker v. Cronin*, 107 Mass., at page 562. Wrongful interference of any kind, even if not malicious, has also been said to be sufficient to afford a cause of action. *Lucke v. Clothing Cutters', etc.*, 77 Md., at page 405, 26 Atl. 507, 19 L. R. A. 408, 39 Am. St. Rep. 421. "We see no sound distinction between persuading by malevolent advice or accomplishing the same result by falsehood or putting in fear." *Moran v. Dunphy*, 177 Mass. 485, 59 N. E. 125, 52 L. R. A. 115, 83 Am. St. Rep. 289; but see *Perkins v. Pendleton*, 90 Me. 166, 38 Atl. 96, 60 Am. St. Rep. 252; cf. *Frank v. Herold*, 63 N. J. Eq. 443, 52 Atl. 152.

In some states it is held that the action lies, even though the contract would not have been enforceable against the party who was induced to break it [*Perkins v. Pendleton*, 90 Me. 166, 38 Atl. 96, 60 Am. St. Rep. 252, citing the cases]; as, e. g., where a servant whose discharge was wrongfully induced by defendant was only hired at will. *Id.*; *Noice v. Brown*, 39 N. J. Law, 569; *Moran v. Dunphy*, 177 Mass., at page 487, 59 N. E. 125, 52 L. R. A. 115, 83 Am. St. Rep. 289. Again, in some jurisdictions it is actionable, not only to wrongfully induce the breaking of an actual contract with A, but to wrongfully deter others from entering into contracts or business dealings with A. *Rice v. Albee*, 164 Mass. 88, 41 N. E. 122; *May v. Wood*, 172 Mass. 11, 14, 51 N. E. 191; *Temperton v. Russell* [1893] 1 Q. B. 715; *Quinn v. Leatham* [1901] A. C. 495; contra, *Guethler v. Altman*, 26 Ind. App. 587, 60 N. E. 355, 84 Am. St. Rep. 313.

Some decisions in this country do not agree with the above authorities. They concede that an action lies [a] for enticing a servant away from his master; [b] for procuring, by fraud, threats, or violence, the breach of a contract by a party thereto, to the damage of the other party; but they decline to go farther. Thus no action was held to lie, where a theatrical manager maliciously induced an actress to break her engagement at another theater and to perform at his own [*Boulier v. Macauley*, 91 Ky. 135, 15 S. W. 60, 11 L. R. A. 550, 34 Am. St. Rep. 171]; or where a person maliciously induced a vendor of goods to sell and deliver them to him, and thus violate his contract with the original purchaser [*Chambers v. Baldwin*, 91 Ky. 121, 15 S. W. 57, 11 L. R. A. 545, 34 Am. St. Rep. 165]; or where a person maliciously induced an innkeeper to break his contract with a lodger and his family [*Boyson v. Thorn*, 98 Cal. 378, 33 Pac. 492, 21 L. R. A. 233; *Glencoe Gravel Co. v. Hudson Bros. Co.*, 138 Mo. 439, 40 S. W. 93, 36 L. R. A. 804, 60 Am. St. Rep. 590; cf. *Kline v. Eubanks*, 109 La. 241, 33 South. 211].

In some states there are statutes making it a criminal offense to entice away or knowingly employ laborers or tenants of another. *Streater v. State*, 137 Ala. 93, 34 South. 395; *Caldwell v. O'Neal*, 117 Ga. 775, 45 S. E. 41.)

**Torts, as distinguished from crimes, do not, in general, involve a wrongful intent.**

(T. Raym. 467.)

**BESSEY v. OLLIOT et al.** (In part).

(Court of King's Bench. Trinity Term, 1682.)

**TRESPASS—INTENT.**

An action may be maintained for a trespass although there was no wrongful intent on the part of defendant, the ground of recovery being compensation for the loss or damage suffered.

**Error to Common Pleas.**

Action by Bessey against Olliot and Lambert for assault and false imprisonment. The following is an extract from the report of the decision:

In all civil acts the law doth not so much regard the intent of the actor as the loss and damage of the party suffering; and therefore Mich., 6 E. 4, 7, pl. 18. Trespass quare vi et armis clausum fregit and herbam suam pedibus conculcando consumpsit in six acres. The defendant pleads that he hath an acre lying next the said six acres, and upon it a hedge of thorns, and he cut the thorns, and they ipso invito fell upon the plaintiff's land, and the defendant took them off as soon as he could, which is the same trespass; and the plaintiff demurred; and adjudged for the plaintiff; for, though a man doth a lawful thing, yet, if any damage do thereby befall another, he shall answer for it, if he could have avoided it. As if a man lop a tree, and the boughs fall upon another ipso invito, yet an action lies. And the reason is because he that is damaged ought to be recompensed. But otherwise it is in criminal cases, for there *actus non facit reum nisi mens sit rea*.

(In *Read v. Friendly Society*, etc. [1902] 2 K. B. 732, it is said by Stirling, J.: "If an action is brought for trespass to land, and the defendant justifies under an alleged right of way, judgment must go against him if he fails to establish the right, however honestly he may have believed in its existence. If an action is brought for the publication of defamatory matter, and the defendant sets up that it was published on a privileged occasion, he will fail in his defense unless the privilege is established, however clear his good faith may be.")

Where defendant was engaged in blasting rocks, and fragments were thrown against and injured the plaintiff's dwelling upon lands adjoining, defendant was held liable on the ground of trespass, though no negligence or want of skill in executing the work was alleged or proved against him. *Hay v. Cohoes Co.*, 2 N. Y. 159, 51 Am. Dec. 279; *Tremain v. Cohoes Co.*, 2 N. Y. 163, 51 Am. Dec. 284. And the same rule has been applied where the blasting cast a piece of wood upon a person lawfully traveling along the public highway. *Sullivan v. Dunham*, 161 N. Y. 290, 55 N. E. 923, 47 L. R. A. 715, 76 Am. St. Rep. 274. But see *Holmes v. Mather*, L. R. 10 Ex. 261; *Stanley v. Powell* [1891] 1 Q. B. 86. But where the result of blasting is to injure adjacent property by concussion and vibration only, without casting any material on the premises, *negli-*

gence in blasting must be proved, to afford a cause of action. *Benner v. Atlantic Dredging Co.*, 134 N. Y. 156, 31 N. E. 328, 17 L. R. A. 220, 30 Am. St. Rep. 649; *Booth v. Rome, W. & O. T. R. Co.*, 140 N. Y. 267, 35 N. E. 592, 24 L. R. A. 105, 37 Am. St. Rep. 552, reported *supra*, at p. 51.

The doctrine laid down in *Bessey v. Olliot*, and asserted in other early decisions, that "in civil acts the law doth not so much regard the *intent of the actor* as the *loss and damage of the party suffering*," is discussed in *Brown v. Collins*, 53 N. H. 442, 16 Am. Rep. 372, and *Stanley v. Powell*, *supra*, and its accordance with modern law considered.)

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(19 Johns. 381, 10 Am. Dec. 234.)

GUILLE v. SWAN.

(Supreme Court of New York. January, 1822.)

**TRESPASS TO LAND—INTENT.**

A balloon in which defendant had ascended near plaintiff's garden descended into the garden, with defendant's body hanging out of the car, so that he was in much danger. He called for help, and a crowd of persons broke into the garden, and plaintiff's vegetables and flowers were beaten down by the balloon and by the people. *Held*, that defendant was liable for all the damage so sustained by plaintiff, although the injury done by himself was involuntary, and although his ascending in the balloon was not an unlawful act.

Certiorari to review a judgment of a justice of the peace.

Action of trespass by Swan against Guille. Defendant had ascended in a balloon in the vicinity of plaintiff's garden, but the balloon descended into the garden, and defendant, whose body was hanging out of the car in a very perilous position, called for help to a person working in plaintiff's field. More than 200 people broke through plaintiff's fences into his garden, and his vegetables and flowers were trodden and beaten down by them, and by the balloon, which dragged over them about 30 feet, when defendant was taken out. The damage done by defendant and his balloon amounted to about \$15, but the crowd did much more, and the total damage to plaintiff was \$90. At the trial before a justice of the peace, he instructed the jury that defendant was liable for the damage done to plaintiff by the crowd as well as that done by defendant himself. The jury found a verdict for plaintiff for \$90, and judgment for plaintiff was entered thereon. To review the judgment plaintiff brought certiorari.

SPENCER, C. J. The counsel for the plaintiff in error supposes that the injury committed by his client was involuntary, and that done by the crowd was voluntary, and that, therefore, there was no union of intent; and that, upon the same principle which would render Guille answerable for the acts of the crowd, in treading down and

destroying the vegetables and flowers of S., he would be responsible for a battery or a murder committed on the owner of the premises. The intent with which an act is done is by no means the test of the liability of a party to an action of trespass. If the act cause the immediate injury, whether it was intentional or unintentional, trespass is the proper action to redress the wrong. It was so decided, upon a review of all the cases, in *Percival v. Hickey*, 18 Johns. 257, 9 Am. Dec. 210. Where an immediate act is done by the co-operation or the joint act of several persons, they are all trespassers, and may be sued jointly or severally; and any one of them is liable for the injury done by all. To render one man liable in trespass for the acts of others, it must appear, either that they acted in concert, or that the act of the individual sought to be charged ordinarily and naturally produced the acts of the others. The case of *Scott v. Shepherd*, 2 W. Bl. 892, is a strong instance of the responsibility of an individual who was the first, though not the immediate, agent in producing an injury. Shepherd threw a lighted squib, composed of gunpowder, into a market-house where a large concourse of people were assembled. It fell on the standing of Y., and, to prevent injury, it was thrown off his standing, across the market, where it fell on another standing. From thence, to save the goods of the owner, it was thrown to another part of the market-house, and, in so throwing it, it struck the plaintiff in the face, and, bursting, put out one of his eyes. It was decided, by the opinion of three judges against one, that Shepherd was answerable in an action of trespass and assault and battery. De Grey, C. J., held that throwing the squib was an unlawful act, and that, whatever mischief followed, the person throwing it was the author of the mischief. All that was done subsequent to the original throwing was a continuation of the first force and first act. Any innocent person removing the danger from himself was justifiable; the blame lights on the first thrower; the new direction and new force flow out of the first force. He laid it down as a principle that every one who does an unlawful act is considered as the doer of all that follows. A person breaking a horse in *Lincolns-Inn-Fields* hurt a man, and it was held that trespass would lie. In *Leame v. Bray*, 3 East, 595, Lord Ellenborough said: "If I put in motion a dangerous thing, as if I let loose a dangerous animal, and leave to hazard what may happen, and mischief ensue, I am answerable in trespass; and if one," he says, "put an animal or carriage in motion, which causes an immediate injury to another, he is the actor,—the *causa causans*." I will not say that ascending in a balloon is an unlawful act, for it is not so; but it is certain that the aeronaut has no control over its motion horizontally. He is at the sport of the winds, and is to descend when and how he can. His reaching the earth is a matter of hazard. He did descend on the premises of the plaintiff below, at a short distance from the place where he ascended. Now, if his descent, under

such circumstances, would ordinarily and naturally draw a crowd of people about him, either from curiosity, or for the purpose of rescuing him from a perilous situation, all this he ought to have foreseen, and must be responsible for. Whether the crowd heard him call for help or not is immaterial. He had put himself in a situation to invite help, and they rushed forward, impelled, perhaps, by the double motive of rendering aid, and gratifying a curiosity which he had excited. Can it be doubted that, if the plaintiff in error had beckoned to the crowd to come to his assistance, he would be liable for their trespass in entering the inclosure? I think not. In that case they would have been co-trespassers, and we must consider the situation in which he placed himself, voluntarily and designedly, as equivalent to a direct request to the crowd to follow him. In the present case, he did call for help, and may have been heard by the crowd. He is therefore undoubtedly liable for all the injury sustained.

Judgment affirmed.

(For other cases holding that a wrong intent is not a necessary element to constitute a tort, see *Striegel v. Moore*, 55 Iowa, 88, 7 N. W. 413 [trespass to lands]; *Carlton v. Henry*, 129 Ala. 479, 29 South. 924; *Morgan v. O'Daniel* [Ky.] 53 S. W. 1040 [assault]; *Anderson v. Arnold's Ex'r*, 79 Ky. 370; *Vosburg v. Putney*, 80 Wis. 523, 50 N. W. 403, 14 L. R. A. 226, 27 Am. St. Rep. 47; *Chapman v. State*, 78 Ala. 463, 56 Am. Rep. 42 [cases of assault and battery]. But in such torts as *fraud*, *malicious prosecution*, and other wrongs involving *malice*, a wrongful intent is necessary [see the cases hereinafter on these topics]. That a wrongful intent accompanying a lawful act does not give a cause of action, see *supra*, pp. 6, 71; but that malicious acts, under other circumstances, will give a cause of action if they occasion damage, see *supra*, pp. 69, 71.)

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(61 N. Y. 477.)

PEASE et al. v. SMITH et al. (In part.)

(Court of Appeals of New York. January Term, 1875.)

**CONVERSION—NOTICE OF OWNER'S TITLE—INTENT.**

Where goods were stolen from the owners and sold, the purchasers, by reselling them, were guilty of conversion, though no demand was made for the goods while in their possession, and though they had no knowledge of the title of the real owners. A wrongful intent is not an essential element in a conversion.

Appeal from judgment of the General Term of the Supreme Court in the Third Judicial Department.

Action for conversion of a quantity of law blanks.

Defendants purchased from a junk dealer, Moses K. Perry, the law blanks which had been stolen from plaintiffs by a porter in their employ. Defendants sold the blanks in good faith before any demand was made upon them. A demand was made of the defendants for the value of the blanks before the commencement of the action, but the de-

fendants refused to pay. From a judgment entered on a verdict for plaintiffs (5 Lans. 519), defendants appeal. Affirmed.

DWIGHT, C. It is claimed that the judge erred at the trial in refusing to grant a nonsuit, because the defendants bought the goods in controversy in the course of trade, and had sold them before any claim was made by the owners. It is insisted by the appellants that it is a prerequisite to a valid claim for conversion, in such a case, that a demand should have been made for the goods while they were in the defendants' possession, and before their sale, and that there can be no conversion, unless control over the property was exercised with knowledge of the plaintiffs' rights. This proposition is untenable. The assumed sale by the porter of the plaintiffs to Perry was wholly nugatory, and conveyed no title. *Saltus v. Everett*, 20 Wend. 267, 32 Am. Dec. 541; *McGoldrick v. Willits*, 52 N. Y. 612. On like grounds, the sale by Perry to the defendants was without effect. They were constructively in possession of the plaintiffs' property without the consent of the latter. They even sent their own carts to transfer the goods when sold to Allen Bros. This exercise of an act of ownership or dominion over the plaintiffs' property, assuming to sell and dispose of it as their own, was, within reason and the authorities, an act of conversion to their own use. The assumed act of ownership was inconsistent with the dominion of the plaintiffs, and this is of the essence of a conversion. Knowledge and intent on the part of the defendants are not material. So long as the defendants had exercised no act of ownership over the property, and had acted in good faith, a demand and refusal would be necessary to put them in the wrong and to constitute conversion. Until such demand there is no apparent inconsistency between their possession and the plaintiffs' ownership. After a sale has been made by the defendants, they have assumed to be the owners, and will be estopped to deny, in an action by the lawful owner, the natural consequences of their act, and to resist an action for the value of the goods. The principle is well stated by Alderson, B., in *Fouldes v. Willoughby*, 8 M. & W. 540: "Any asportation of a chattel for the use of the defendant or a third person amounts to a conversion, for this simple reason, that it is an act inconsistent with the general right of dominion which the owner of a chattel has in it, who is entitled to the use of it at all times and in all places." In the same spirit, "conversion" is defined, in a very recent case, to be an unauthorized act which deprives another of his property permanently or for an indefinite time. *Hiort v. Bott*, L. R. 9 Ex. 86 [A. D. 1874]. So, it is said in *Boyce v. Brockway*, 31 N. Y. 490, that a wrongful intent is not an essential element in a conversion. It is enough that the rightful owner has been deprived of his property by some unauthorized act of another assuming dominion or control over it. See *Hollins v. Fowler* (House of Lords, July 6,

1875). No manual taking on the defendant's part is necessary. *Bristol v. Burt*, 7 J. R. 254; *Connah v. Hale*, 23 Wend. 462. The case of *Harris v. Saunders*, 2 Strob. Eq. 370, resembles closely the case at bar. The defendant, having the property of the plaintiff in his own hands by purchase from one who had no title, sold it to another, who carried it beyond the plaintiff's reach, and received the purchase money. These acts were held to amount to a conversion, though the defendant was not aware of the plaintiff's title. As, according to these views, the conversion took place at the moment of the unauthorized sale by the present defendants, no demand was necessary, the sole object of a demand being to turn an otherwise lawful possession into an unlawful one, by reason of a refusal to comply with it, and thus to supply evidence of a conversion. *Esmay v. Fanning*, 9 Barb. 176; *Vincent v. Conklin*, 1 E. D. Smith, 203; *Glassner v. Wheaton*, 2 E. D. Smith, 352; *Munger v. Hess*, 28 Barb. 75. After a wrongful taking and carrying away of the property, the cause of action has become complete without further act on the plaintiff's part. *Brewster v. Silliman*, 38 N. Y. 423; *Hanmer v. Wilsey*, 17 Wend. 91; *Otis v. Jones*, 21 Wend. 394.

On the whole, no error was committed at the trial, and the judgment of the court below should be affirmed. All concur.

Judgment affirmed.

(To the same effect as to conversion are *Roe v. Campbell*, 40 Hun, 49; *Lovell v. Shea*, 18 N. Y. Supp. 193; *Levi v. Booth*, 58 Md. 305, 42 Am. Rep. 332; *Gore v. Izer*, 64 Neb. 843, 90 N. W. 758; *Johnson v. Martin*, 87 Minn. 370, 92 N. W. 221, 59 L. R. A. 733, 94 Am. St. Rep. 706; *Hollins v. Fowler*, L. R. 7 H. L. 757.)

## Same principle; lunatics liable for torts.

(121 Ill. 660, 13 N. E. 239, 2 Am. St. Rep. 140.)

MCINTYRE v. SHOLTY (in part).

(Supreme Court of Illinois. September 27, 1887.)

### TORTIOUS ACTS OF LUNATIC—LIABILITY.

Though a lunatic is not punishable criminally, he is liable in a civil action for torts committed by him. Hence where a lunatic shot and killed a person, and very soon afterwards died himself, *held*, that an action was maintainable against his administrator under the statute allowing a recovery of damages for an injury causing death.

Error to Appellate Court, Third District; Owen T. Reeves, Judge.

MAGRUDER, J. This is an action of trespass, brought by defendant in error against plaintiff in error, in the circuit court of Mc-

Lean county, under the "Act requiring compensation for causing death by wrongful act, neglect, or default;" being chapter 70 of the Revised Statutes, entitled "Injuries." Hurd, Rev. St. 1885, p. 695. Jury was waived by agreement, and the case was tried without a jury before the judge of the circuit court, who gave judgment for the plaintiff for \$2,500. This judgment has been affirmed by the appellate court, and is brought before us for review by writ of error to the latter court.

Hannah Sholty was the wife of Levi Sholty, a farmer living in McLean county, near Bloomington. About February 17, 1886, a working-man upon Levi Sholty's farm discovered a man in the barn, who, to all appearances, had been concealing himself there for some time. The person so concealed is proven to have been defendant's intestate, Benjamin D. Sholty, a brother of Levi Sholty. Some efforts seem to have been made on February 17th or 18th to get the officers of the law in Bloomington to go out to the farm and arrest Benjamin D. Sholty, called by the witness David Sholty. This effort, however, failed. Accordingly, Levi Sholty and his hired man, and a number of his neighbors, gathered at his house on the afternoon of February 18, 1886, for the purpose of watching for the intruder, and getting him out of his hiding-place. The barn was 40 or 50 feet wide, and from 80 to 100 feet long. It was situated about 150 or 200 feet northwest from the house. The granary was in the western end of the barn, and in the end that was furthest from the house. About 6 o'clock in the evening, David Sholty was discovered in the granary by his brother Levi and one McCoy, who were on watch just outside of the granary door. He shot at them twice with a pistol, while they were trying to prevent his escape, and to capture him. Others who were waiting in the house came to their assistance. A rope was obtained, with the intention of tying him, if captured. Presently there was a cry of fire, and the flames were seen to be breaking out at the eastern end of the barn, being the end nearest towards the house. At this time Mrs. Hannah Sholty, plaintiff's intestate, went from the house towards the barn, and had advanced about half of the distance between the two, when David Sholty appeared in the door at the eastern end of the barn, with a shot-gun. He was plainly visible in the light made by the fire that had broken out. He called upon Mrs. Sholty and her daughter Mary, who was with her, to stop. They stopped, turned, and had advanced a few feet on their way back towards the house, when David Sholty fired at them with the gun in his hand. Both were shot. The daughter was wounded in the wrist, and the mother was killed. This action is brought by her husband, as administrator of her estate, to recover damages for her death, against the administrator of the estate of David Sholty, who is said to have perished in the flames of the burning barn.

The defendant introduced no testimony, except that the examination of one witness was begun, and abandoned, after a few preliminary questions, on account of the ruling of the court as hereafter stated. The defense proposed to show by the witness on the stand, and by others there present in court, that defendant's intestate, Benjamin D. Sholty, was insane at the time Mrs. Sholty was killed. The court refused to receive evidence of his insanity, and exception was taken to the ruling. The question presented relates to the liability of an insane person for injuries committed by him.

It is well settled that, though a lunatic is not punishable criminally, he is liable in a civil action for any tort he may commit. However justly this doctrine may have been originally subject to criticism, on the grounds of reason and principle, it is now too firmly supported by the weight of authority to be disturbed. It is the outcome of the principle that in trespass the intent is not conclusive. Mr. Sedgwick, in his work on Damages, (marg. page 456,) says that, on principle, a lunatic should not be held liable for his tortious acts. Opposed to his view, however, is a majority of the decisions and text writers. There certainly can be nothing wrong or unjust in a verdict which merely gives compensation for the actual loss resulting from an injury inflicted by a lunatic. He has properly no will. His acts lack the element of intent, or intention. Hence it would seem to follow that the only proper measure of damages in an action against him for a wrong, is the mere compensation of the party injured. Punishment is not the object of the law when persons unsound in mind are the wrong-doers. There is, to be sure, an appearance of hardship in compelling one to respond for that which he is unable to avoid, for want of the control of reason. But the question of liability in these cases is one of public policy. If an insane person is not held liable for his torts, those interested in his estate, as relatives, or otherwise, might not have a sufficient motive to so take care of him as to deprive him of opportunities for inflicting injuries upon others. There is more injustice in denying to the injured party the recovery of damages for the wrong suffered by him, than there is in calling upon the relatives or friends of the lunatic to pay the expense of his confinement, if he has an estate ample enough for that purpose. The liability of lunatics for their torts tends to secure a more efficient custody and guardianship of their persons. Again, if parties can escape the consequences of their injurious acts upon the plea of lunacy, there will be a strong temptation to simulate insanity, with a view of masking the malice and revenge of an evil heart. The views here expressed are sustained by the following authorities: Cooley, Torts, 99-103; 2 Saund. Pl. & Ev. 318; Shear. & R. Neg. § 57; Weaver v. Ward, Hob. 134; Morse v. Crawford, 17 Vt. 499, 44 Am. Dec. 349; Behrens v. McKenzie, 23 Iowa, 333, 92 Am. Dec. 428; Krom v. Schoonmaker, 3 Barb. 647; also cases in note to said case, in Ewell!

Lead. Cas. 642. In the light of the principles thus announced we find no error in the ruling of the circuit court upon this subject.

Judgment affirmed.

(The same is held in the following cases: *Williams v. Hays*, 143 N. Y. 442, 38 N. E. 449, 26 L. R. A. 153, 42 Am. St. Rep. 743 [cf. S. C. 157 N. Y. 541, 52 N. E. 589, 43 L. R. A. 253, 68 Am. St. Rep. 797]; *Jewell v. Colby*, 66 N. H. 399, 24 Atl. 902; *Holdom v. Ancient Order of United Workmen*, 159 Ill. 619, 43 N. E. 772, 31 L. R. A. 67, 50 Am. St. Rep. 183. In *Williams v. Hays*, *supra*, it is said: "The general rule is that an insane person is just as responsible for his torts as a sane person, and the rule applies to all torts, except perhaps those in which malice, and therefore intention, actual or imputed, is a necessary ingredient, like libel, slander, and malicious prosecution." *Irvine v. Gibson* [Ky.] 77 S. W. 1106, is a recent case holding that an insane person is not liable for slander.)

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(132 Mass. 87, 42 Am. Rep. 423.)

MORAIN v. DEVLIN.

(Supreme Judicial Court of Massachusetts. January 3, 1882.)

NEGLIGENCE—DANGEROUS PREMISES—INSANITY OF OWNER.

The owner of a building may be liable for personal injuries to another caused by the defective condition of the building, although such owner is insane, and although a guardian has been appointed for him and has the care and management of his estate.

Exceptions from Superior Court.

Action of tort by Sophia Morain against Margaret Devlin, for personal injuries to plaintiff, alleged to have been caused by a defect in a door-step of a tenement building belonging to defendant. At the trial it was admitted that, since a time several years before the accident to plaintiff, defendant had been insane, and had been confined in a hospital for lunatics; and that, at that time, a guardian for defendant had been appointed, who had ever since held the appointment, and had had the care and management of all the property of defendant. Said guardian was also appointed guardian ad litem for defendant. A request was presented to the judge, on behalf of defendant, for an instruction to the jury that, on these facts, as a matter of law, the action could not be sustained, but the request was refused. The jury found a verdict for plaintiff. Defendant alleged exceptions to the refusal to give the instruction requested.

GRAY, C. J. By the common law, as generally stated in the books, a lunatic is civilly liable to make compensation in damages to persons injured by his acts, although, being incapable of criminal intent, he is not liable to indictment and punishment. Bac. Max. reg. 7; *Weaver v. Ward*, Hob. 134; 2 Rolle, Abr. 547; 1 Hale, P. C. 15, 16; 1 Hawk, c. 1, § 5; Bac. Abr. "Idiots & Lunatics," E; Haycraft

v. Creasy, 2 East, 92, 104; 1 Chit. Pl. (2d Amer. Ed.) 65; Morse v. Crawford, 17 Vt. 499, 44 Am. Dec. 349; Cross v. Kent, 32 Md. 581; Ward v. Conatser, 4 Baxt. 64; Bullock v. Babcock, 3 Wend. 391, 393, 394; Behrens v. McKenzie, 23 Iowa, 333, 343, 92 Am. Dec. 428; Bank v. Moore, 78 Pa. 407, 412, 21 Am. Rep. 24. See, also, Dickinson v. Barber, 9 Mass. 225, 6 Am. Dec. 58; Brown v. Howe, 9 Gray, 84, 85, 69 Am. Dec. 276. But this case does not require the affirmance of so broad a proposition. This is not an action for a wrong done by the personal act or neglect of the lunatic, but for an injury suffered by reason of the defective condition of a place, not in the exclusive occupancy and control of a tenant, upon real estate of which the lunatic himself, and not his guardian, is the owner. Harding v. Larned, 4 Allen, 426; Harding v. Weld, 128 Mass. 587, 591. The owner of real estate is liable for such a defect, although not caused by his own neglect, but by that of persons acting in his behalf or under contract with him. Looney v. McLean, 129 Mass. 33, 37 Am. Rep. 295; Gorham v. Gross, 125 Mass. 232, 28 Am. Rep. 234; Bartlett v. Gas-Light Co., 117 Mass. 533, 19 Am. Rep. 421. And there is no precedent and no reason for holding that a lunatic, having the benefits, is exempt from the responsibilities of ownership of real estate. The ruling requested was therefore rightly refused.

Exceptions overruled.

MORTON and ALLEN, JJ., absent.



**There is, however, no liability in tort for purely accidental injuries.**

(6 Cush. 292.)

**BROWN v. KENDALL** (in part).

(Supreme Judicial Court of Massachusetts. October Term, 1850.)

#### **ASSAULT AND BATTERY—ACCIDENTAL INJURY.**

Defendant, while endeavoring to part fighting dogs, one of which was his own, by striking them with a stick, retreated backwards before them towards the place where plaintiff, the owner of the other dog, had been standing, plaintiff at the same time advancing a step or two towards them; and defendant, in raising his stick to strike the dogs, plaintiff being behind him, unintentionally struck plaintiff in the eye with the stick, causing a severe injury. *Held*, that defendant's act in attempting to part the dogs was lawful and proper, and if, in doing it, he used due care and all proper precautions to avoid hurt to others, the injury to plaintiff was the result of pure accident, or was involuntary and unavoidable, and defendant was not liable therefor.

Exceptions from Court of Common Pleas; Wells, C. J.

Action of trespass by George Brown against George K. Kendall for assault and battery. Pending the suit defendant died, and his executrix was substituted. At a trial it appeared from the evidence that while two dogs, belonging, respectively, to plaintiff and to defendant, were fighting, defendant, in order to separate them, took a stick and began beating them. Plaintiff was also present, and looking on, at the distance of about a rod from the dogs, and advanced a step or two towards them. The dogs, as they struggled together, also approached plaintiff, and defendant retreated backwards from them, striking them with the stick. As defendant thus approached plaintiff, having his back towards the latter, in raising his stick over his shoulder to strike the dogs the stick accidentally struck plaintiff in the eye, and injured it severely. Defendant requested the judge to instruct the jury that, "if both the plaintiff and defendant at the time of the blow were using ordinary care, or if at that time the defendant was using ordinary care and the plaintiff was not, or if at that time both plaintiff and defendant were not using ordinary care, then the plaintiff could not recover." The judge declined to give these instructions. The jury found a verdict for plaintiff. Defendant alleged exceptions.

SHAW, C. J. This is an action of trespass *vi et armis*, brought by George Brown against George K. Kendall, for an assault and battery; and, the original defendant having died pending the action, his executrix has been summoned in. The rule of the common law by which the action would abate by the death of either party is reversed in this commonwealth by statute, which provides that actions of trespass for assault and battery shall survive. Rev. St. c. 93, § 7. The facts set forth in the bill of exceptions preclude the supposition that the blow inflicted by the hand of the defendant upon the person of the plaintiff was intentional. The whole case proceeds on the same assumption, that the damage sustained by the plaintiff from the stick held by the defendant was inadvertent and unintentional; and the case involves the question how far, and under what qualifications, the party by whose unconscious act the damage was done is responsible for it. We use the term "unintentional" rather than "involuntary," because, in some of the cases, it is stated that the act of holding and using a weapon or instrument, the movement of which is the immediate cause of hurt to another, is a voluntary act, although its particular effect in hitting and hurting another is not within the purpose or intention of the party doing the act.

It appears to us that some of the confusion in the cases on this subject has grown out of the long-vexed question, under the rule of the common law, whether a party's remedy, where he has one, should be sought in an action of the case or of trespass. This is very dis-

tinguishable from the question whether in a given case any action will lie. The result of these cases is that, if the damage complained of is the immediate effect of the act of the defendant, trespass *vi et armis* lies; if consequential only, and not immediate, case is the proper remedy. *Leame v. Bray*, 3 East, 593; *Huggett v. Montgomery*, (Day's Ed.) 2 Bos. & P. (N. R.) 446, and notes. In these discussions, it is frequently stated by the judges that, when one receives injury from the direct act of another, trespass will lie. But we think this is said in reference to the question whether trespass and not case will lie, assuming that the facts are such that some action will lie. These dicta are no authority, we think, for holding that damage received by a direct act of force from another will be sufficient to maintain an action of trespass, whether the act was lawful or unlawful, and neither willful, intentional, nor careless. In the principal case cited, *Leame v. Bray*, the damage arose from the act of the defendant in driving on the wrong side of the road, in a dark night, which was clearly negligent, if not unlawful. In the course of the argument of that case, (page 595,) Lawrence, J., said: "There certainly are cases in the books where, the injury being direct and immediate, trespass has been holden to lie, though the injury was not intentional." The term "injury" implies something more than damage; but, independently of that consideration, the proposition may be true, because, though the injury was unintentional, the act may have been unlawful or negligent; and the cases cited by him are perfectly consistent with that supposition. So the same learned judge, in the same case, says (page 597): "No doubt trespass lies against one who drives a carriage against another, whether done willfully or not." But he immediately adds: "Suppose one who is driving a carriage is negligent, and heedlessly looking about him, without attending to the road when persons are passing, and thereby runs over a child and kills him, is it not manslaughter? And, if so, it must be trespass; for every manslaughter includes trespass;" showing what he understood by a case not willful.

We think, as the result of all the authorities, the rule is correctly stated by Mr. Greenleaf that the plaintiff must come prepared with evidence to show either that the intention was unlawful, or that the defendant was in fault; for if the injury was unavoidable, and the conduct of the defendant was free from blame, he will not be liable. 2 Greenl. Ev. §§ 85-92; *Wakeman v. Robinson*, 1 Bing. 213. If, in the prosecution of a lawful act, a casualty purely accidental arises, no action can be supported for an injury arising therefrom. *Davis v. Saunders*, 2 Chit. 639; Com. Dig. "Battery," A, (Day's Ed.) and notes; *Vincent v. Stinehour*, 7 Vt. 62. In applying these rules to the present case, we can perceive no reason why the instructions asked for by the defendant ought not to have been given, to this effect, that if both plaintiff and defendant at the time of the blow were using or-

dinary care, or if at that time the defendant was using ordinary care, and the plaintiff was not, or if at that time both the plaintiff and defendant were not using ordinary care, then the plaintiff could not recover.

In using this term "ordinary care," it may be proper to state that what constitutes ordinary care will vary with the circumstances of cases. In general, it means that kind and degree of care which prudent and cautious men would use, such as is required by the exigency of the case, and such as is necessary to guard against probable danger. A man who should have occasion to discharge a gun, on an open and extensive marsh, or in a forest, would be required to use less circumspection and care than if he were to do the same thing in an inhabited town, village, or city. To make an accident, or casualty, or, as the law sometimes states it, inevitable accident, it must be such an accident as the defendant could not have avoided by the use of the kind and degree of care necessary to the exigency, and in the circumstances in which he was placed.

We can have no doubt that the act of the defendant in attempting to part the fighting dogs, one of which was his own, and for the injurious acts of which he might be responsible, was a lawful and proper act, which he might do by proper and safe means. If, then, in doing this act, using due care and all proper precautions necessary to the exigency of the case to avoid hurt to others, in raising his stick for that purpose, he accidentally hit the plaintiff in his eye, and wounded him, this was the result of pure accident, or was involuntary and unavoidable, and therefore the action would not lie.

New trial ordered.

(Other important cases holding that there is no liability in tort for purely accidental injuries are *Stanley v. Powell* [1891] 1 Q. B. 86; *Brown v. Collins*, 53 N. H. 442, 16 Am. Rep. 372; *Cleveland v. N. J. Steamboat Co.*, 125 N. Y. 299, 28 N. E. 327; *Hollenbeck v. Johnson*, 79 Hun, 499, 29 N. Y. Supp. 945; *Morris v. Platt*, 32 Conn. 75; *Ford v. Whiteman*, 2 Pennewill (Del.) 355, 45 Atl. 543; *Nitro-Glycerine Case*, 15 Wall. 524, 21 L. Ed. 206; *Brown v. Boom Co.*, 109 Pa. 57, 1 Atl. 156, 58 Am. Rep. 708; *Wall v. Lit*, 195 Pa. 375, 46 Atl. 4; *Lansing v. Stone*, 37 Barb. 15; *Washington, C. & A. Turnpike v. Case*, 80 Md. 36, 30 Atl. 571.)

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(Hill & D. Supp. 193.)

HARVEY v. DUNLOP.

(Supreme Court of New York. 1843.)

# 1. INEVITABLE ACCIDENT.

There is no liability at law for an injury arising from inevitable accident, or for an act which ordinary human care and foresight are unable to guard against.

**2. SAME—PERSONAL INJURIES.**

Accordingly, in an action for throwing a stone at the plaintiff's daughter and putting out her eye, where it did not appear that the injury was inflicted by design or carelessness, but, on the contrary, that it was purely accidental, *held*, that the plaintiff could not recover.

Action of trespass against defendant, a boy of six years, for throwing a stone at plaintiff's daughter (Clementine), who was about five years of age, and putting out her eye. Defendant admitted throwing the stone, but it did not appear whether this was done through accident or design. Verdict for defendant, and plaintiff moved for a new trial. Denied.

NELSON, C. J. I am of opinion that the grounds upon which the learned judge placed the case before the jury were correct. No case or principle can be found, or if found can be maintained, subjecting an individual to liability for an act done without fault on his part, and this was substantially the doctrine of the charge. All the cases concede that an injury arising from inevitable accident, or, which in law or reason is the same thing, from an act that ordinary human care and foresight are unable to guard against, is but the misfortune of the sufferer, and lays no foundation for legal responsibility. Thus it is laid down that "if one man has received a corporal injury from the voluntary act of another an action of trespass lies, provided there was a neglect or want of due caution in the person who did the injury, although there was no design to injure." *Bac. Abr. tit. "Trespass," D.* But if not imputable to the neglect of the party by whom it was done, or to his want of caution, an action of trespass does not lie, although the consequences of a voluntary act. *Weaver v. Ward*, *Hob. 134*; *Gibbons v. Pepper*, *4 Mod. 405*. It was said by Dallas, C. J., in *Wakeman v. Robinson*, *1 Bingh. 213*, "if the accident happened entirely without default on the part of the defendant, or blame imputable to him, the action does not lie"; and the same principle is recognized in *Bullock v. Babcock*, *3 Wend. 391*.

But it is said that, inasmuch as the defendant admitted the injury to have been inflicted by him, it should be presumed to have been done wrongfully or carelessly, and that the onus lay upon him to show the contrary. This is undoubtedly a sound general principle, and the plaintiff is entitled to the full benefit of it; but it was for the jury to determine, upon the facts and circumstances before them, whether or not the defendant was in the wrong. In order to arrive at a decision upon this question, the jury had a right to take into consideration the childhood of the parties, the friendly relations existing between them, the conduct of both on their return home, but more especially the repeated admissions of the plaintiff that the defendant was not to blame. The latter fact was very material, and must and should have produced a strong impression upon the minds of the

jury in the absence of the testimony of Clementine, because the natural inference to be drawn from the declarations was that the plaintiff had received the information upon which they were based from his daughter's account of the transaction, and had frankly disclosed it though the admissions operated against his own interest. These admissions, taken in connection with the other facts and circumstances in the case, were undoubtedly decisive of the true character of the transaction, and they conduct us satisfactorily to the same conclusion arrived at by the jury, that the misfortune happened without fault on either side, and that it was one of those unhappy accidents to which children of the tender age of these parties are not infrequently exposed in their little innocent plays and amusements—a result rather to be deplored than punished.

New trial denied.

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**An action upon tort lies for the breach of a right or duty created by law, even though the performance of such right or duty may have been assumed by contract. In such cases the plaintiff may either sue *ex contractu* or *ex delicto*.**

(61 Md. 619, 48 Am. Rep. 134.)

**BALTIMORE CITY PASS. RY. CO. v. KEMP et ux.**

(Court of Appeals of Maryland. July 3, 1884.)

**1. NEGLIGENCE—REMOTE CONSEQUENCES—QUESTION FOR JURY.**

By the alleged negligence of a railway company, a woman, previously in good health, was injured, while a passenger on its railway, by a blow upon the breast, which thereafter continued to be sore, until, within two or three weeks, a cancer appeared there. There was evidence that such a blow might be sufficient to cause the development of cancer, although the origin of a cancer, in any particular case, cannot be certainly known. *Held*, that the question whether the cancer was the result of the injury was one for the jury, upon the facts.

**2. SAME—BREACH OF DUTY ARISING FROM CONTRACT—ELECTION OF REMEDY.**

A common carrier of passengers owes, to a person accepted to be carried, a duty to be careful, irrespective of contract, the violation of which duty is a tort, giving a right of action; and while a passenger may sue for a breach of contract, where there is one, he may, at his election, proceed as for a tort, where personal injury has been suffered by the negligence or wrongful act of the carrier or his agents.

Motion for reargument of appeal from circuit court, Howard county. See 61 Md. 74.

Action by Charles E. Kemp and Adaline Kemp, his wife, against the Baltimore City Passenger Railway Company, for personal inju-

ries to the wife, alleged to have been caused by the negligence of defendant. Evidence tending to show that a cancer, from which the wife suffered, was the result of the injury, was given at the trial, and its substance was stated, in the opinion of the court on the hearing of the appeal, as follows: "The evidence shows, clearly and without contradiction, that Mrs. Kemp was, at the time of the accident, and for many years prior thereto, apparently in good health and condition. The accident occurred about the middle of May, 1880, and a very short time thereafter the cancer commenced its development on the injured part of her person. In her testimony, after describing the manner in which the accident occurred, and how she was thrown against the railing on the platform of the car, as she was about getting off, and the hurting of her right arm and left breast, she states that the right arm was bruised and discolored; and where the breast was struck it was sore, and remained so from that time out. Prior to that time she had no pain or soreness; and two or three weeks afterwards a small lump appeared in the left breast, which, upon being shown to her physicians, was pronounced to be a cancer. Dr. Smith first operated for its removal on the 8th of November, 1880, when it was about the size of an orange, and he operated again about the 12th of January, 1881, when the entire breast was removed, but without success in extirpating the roots of the disease. The cancer still remains, and is pronounced to be incurable. The two daughters of Mrs. Kemp, in their testimony, fully corroborate the statement of their mother in regard to her previous good health, and apparent freedom from disease, and the subsequent appearance and growth of the cancer. And the professional witnesses, while they all testify that it is impossible to know and be certain as to the origin of cancer in any given case, yet they all agree in saying that the blow, such as that described by Mrs. Kemp, was sufficient and may have been the cause of the development of cancer in her case. In the opinion of two of the physicians, Dr. Latimer and Dr. Turner, the blow on the breast, as described by Mrs. Kemp, was not only sufficient cause for the production of the cancer, but they would attribute the cancer to that cause; and, from the coincidences of the case, we must say that their opinion does not appear to be unreasonable."

Defendant offered prayer for instructions to the jury, one of which was as follows: "That there is no legally sufficient evidence that the cancer, testified to by the witnesses in this case, was caused by the negligence of the defendant or its servants, and therefore the jury cannot take the same into consideration in estimating the damage done to the plaintiff, Mrs. Kemp, by the negligence of the defendant or its servants, even if they shall find that there was such negligence." This the court rejected, and granted the plaintiff's prayer for instructions, and defendant excepted. The jury found a verdict for plaintiff for \$10,000, and judgment for plaintiff was entered thereon. De-

fendant appealed from the judgment. On the hearing of the appeal, the court rendered an opinion affirming the judgment. Thereafter defendant moved for a reargument of the appeal.

ALVEY, C. J. There has been a motion made in this case for reargument, based largely upon authorities that were not brought to the attention of the court on the former hearing, and hence we depart from the general practice of disposing of such motions without the formal assignment of reasons for the action of the court thereon.

Upon the question whether the jury should have been allowed to infer, upon the evidence before them, that cancer was the result of the injury received by the plaintiff, the defendant cites and relies upon the case of *Jewell v. Railway Co.*, 55 N. H. 84, a case not referred to on the former argument. But the facts of that case are so entirely different from those of the case before us that the analogy between the two cases is but slight. In the first place, the party whose negligence caused the injury in that case was not, according to the decision of the court, the servant or employee of the defendant, and therefore the defendant was not liable for his acts. In the second place, there was a considerable length of time intervening between the time of the accident and the death of the party, the latter in the meantime being engaged in hard work, and subjected to much exposure, and all the circumstances of the case rendered it exceedingly doubtful whether there could be any connection between the injury received by a blow on the right shoulder, and a cancer that was found to exist, by a post mortem examination, in the left lung of the party, a year and a half after the injury received. And the physicians all testified that, in their opinion, neither the last sickness of the party nor the cancer was in any way attributable to the injury previously received. The court, moreover, considered and determined the case upon the weight of evidence, as upon motion for a new trial, and not as upon a demurrer to the legal sufficiency of the evidence to be submitted to the jury, as in the case before us. The other cases cited upon this question have only a remote or indirect bearing, and we do not perceive that they are at all in conflict with the opinion that has been delivered in this case.

Since the opinion in this case was delivered, 50 Mich. has been published, and that volume contains the case of *Beauchamp v. Mining Co.*, at page 163, 15 N. W. 65, 45 Am. Rep. 30. In that case a boy, while passing on a highway, was injured by being struck on the side of his head by a stone from a blast fired by the mining company, and, having died some five or six months thereafter, an action was brought to recover damages for his death, caused, as it was alleged, by the negligence of the defendant. Among other defenses, it was alleged, and evidence was given to show, that death was not caused by the injury, but by specific or typical pneumonia; and the case was

sought to be taken from the jury upon the ground that pneumonia, and not the injury received from the stone, was the direct and proximate cause of the death. The physician who attended the boy in his sickness testified that he died of pneumonia, though he had been very seriously injured, and was paralyzed on one side, and the chances of recovery were against him. The doctor said in his testimony: "I am unprepared to say what caused pneumonia in this case. In my opinion, it was a specific or typical pneumonia; the relation between it and the injured head was not close." It was contended, however, for the plaintiff, that, owing to the broken and shattered condition of the boy's system, caused by the injury received, and his increased susceptibility to cold, pneumonia was superinduced and developed as a natural result of the injury; and that question was submitted to the jury upon the evidence, and they found for the plaintiff. The case was taken to the supreme court of Michigan, and the error assigned was the submission of the question to and allowing the jury to conclude as to whether pneumonia did in fact result from and was a consequence of the injury received by the boy. The supreme court affirmed the ruling of the court below, and held that, "if the injury received and sickness following concurred in and contributed to the attack of pneumonia, the defendant must be held responsible therefor." And so in this case: If the injury received by Mrs. Kemp, by the negligence of the defendant, superinduced and contributed to the production or development of cancer, the defendant is responsible therefor; and the cancer is not to be treated as an independent cause of injury or suffering, any more than pneumonia, resulting from an injury that rendered the system susceptible of and liable to the attack, as a natural consequence of such injury, is to be regarded as an independent cause of death. In both cases the original injury was the prime cause that opened the way to and set other causes in motion, which led to the fatal results. And the wrong-doer cannot be allowed to apportion the measure of his responsibility to the initial cause. Whether the direct causal connections exist is a question, in all cases, for the jury, upon the facts in proof.

There is another ground upon which reargument of the case is asked, and that is with respect to the nature of the action, and for what nature and extent of injury damages may be allowed to be recovered therein. The defendant insists that, while the form of action is as for a tort, yet the real ground of the right to recover in this case is simply for breach of the contract to carry safely, and to put the party down safely. And that being so, according to the contention, it is insisted that, to entitle the plaintiff to damages by reason of a breach of the contract, the injury for which compensation is asked should be shown to be such that it may fairly be taken to have been contemplated by the parties as the possible result of the breach of the contract; and that, in this case, no such consequence as the pro-

duction of cancer in the plaintiff could have been anticipated as the probable result of the negligent act of the defendant. But to this proposition we cannot agree, and, in our opinion, it is not supported by authority.

A common carrier of passengers, who accepts a party to be carried, owes to that party a duty to be careful, irrespective of contract; and the gravamen of an action like the present is the negligence of the defendant. The right to maintain the action does not depend upon contract, but the action is founded upon the common-law duty to carry safely; and the negligent violation of that duty, to the damage of the plaintiff, is a tort or wrong which gives rise to the right of action. *Bretherton v. Wood*, 3 Brod. & B. 54. If this were not so, the passenger would occupy a more unfavorable position in reference to the extent of his right to recover for injuries than a stranger; for the latter, for any negligent injury or wrong committed, can only sue as for a tort, and the measure of the recovery is not only for the actual suffering endured, but for all aggravation that may attend the commission of the wrong; whereas, in the case of a passenger, if the contention of the defendant be supported, for the same character of injury, the right of recovery would be more restricted. The principle of these actions against common carriers of passengers is well illustrated by the case of a servant whose fare had been paid by the master, or the case of a child for whom no fare is charged. In both of the cases mentioned, though there is no contract as between the carrier and the servant, or as between the carrier and the child, yet both servant and the child are passengers, and for any personal injuries suffered by them, through the negligence of the carrier, it is clear they could sue and recover; but they could only sue as for a tort. The authorities would seem to be clear upon the subject, and leave no room for doubt or question.

In the case of *Marshall v. Railroad Co.*, 11 C. B. 655, in discussing the ground of action against a common carrier, Jervis, C. J., said: "But upon what principle does the action lie at the suit of the servant for his personal suffering? Not by reason of any contract between him and the company, but by reason of a duty implied by law to carry him safely." And in the same case Mr. Justice Williams said: "The case was, I think, put upon the right footing by Mr. Hill, when he said that the question turned upon the inquiry whether it was necessary to show a contract between the plaintiff and the railroad company. His proposition was that this declaration could only be sustained by proof of a contract to carry the plaintiff and his luggage for hire and reward to be paid by the plaintiff, and that the traverse of that part of the declaration involves a traverse of the payment by the plaintiff. I am of opinion that there is no foundation for that proposition. It seems to me that the whole current of authorities, beginning with *Govett v. Radnidge*, 3 East, 62, and ending with *Pozzi*

v. Shipton, 8 Adol. & E. 963, establishes that an action of this sort is, in substance, not an action of contract, but an action of tort against the company as carrier." And in the subsequent case of *Austin v. Railway Co.*, L. R. 2 Q. B. 442, Mr. Justice Blackburn, now Lord Blackburn, in delivering his judgment in that case, said: "I think that what was said in the case of *Marshall v. Railroad Co.*, 11 C. B. 655, was quite correct. It was there laid down that the right which a passenger by railway has to be carried safely does not depend on his having made a contract, but that the fact of his being a passenger casts a duty on the company to carry him safely." And to the same effect, and with full approval of the authorities just cited, are the cases of *Foulkes v. Railway Co.*, 4 C. P. Div. 267, and the same case on appeal, 5 C. P. Div. 157, and *Fleming v. Railway Co.*, 4 Q. B. Div. 81. The case of *Bretherton v. Wood*, 3 Brod. & B. 54, is a direct authority upon the question.

A passenger may, without doubt, declare for a breach of contract, where there is one; but it is at his election to proceed as for a tort, where there has been personal injury suffered by the negligence or wrongful act of the carrier, or the agents of the company; and, in such action, the plaintiff is entitled to recover according to the principles pertaining to that class of actions, as distinguished from actions on contract. And this is the settled doctrine and practice in this state. *Stockton v. Frey*, 4 Gill, 406, 45 Am. Dec. 138; *Railroad Co. v. Blocher*, 27 Md. 277, 287; *Turnpike Road v. Boone*, 45 Md. 344; *Stokes v. Saltonstall*, 13 Pet. 181, 10 L. Ed. 115. The motion for reargument must be overruled.

(Both the propositions laid down in this case are well supported by authority. Thus, I. If a personal injury to plaintiff by defendant directly causes a diseased condition, as, e. g., cancer, or rheumatism, or hernia, or ulcers, or congestion, etc., and from this directly results another disease, naturally supervening, as pneumonia, or pleurisy, or paralysis, etc., or if death is a natural result of the original or supervening disease, the defendant is liable for these consequences; and that, too, though the plaintiff was of delicate health or constitution, or infirm, or had a predisposition to the disease which resulted from the injury; as, however, the causes of disease are often obscure or difficult to trace, the question whether the injury was the cause of the disease or death is ordinarily, as in the principal case, considered one for the jury. *Crane Elevator Co. v. Lippert*, 63 Fed. 942, 11 C. C. A. 521; *Bishop v. St. Paul R. Co.*, 48 Minn. 26, 50 N. W. 927; *Terre Haute & I. R. Co. v. Buck*, 96 Ind. 346, 49 Am. Rep. 168; *Louisville, N. A. & C. R. Co. v. Falvey*, 104 Ind. 409, 3 N. E. 389, 4 N. E. 908; *Brashear v. Traction Co.*, 180 Pa. 392, 36 Atl. 914; *Tice v. Munn*, 94 N. Y. 621; *Lyons v. Second Ave. R. Co.*, 89 Hun, 374, 35 N. Y. Supp. 372, affirmed 152 N. Y. 654, 47 N. E. 1109; *McNamara v. Clintonville*, 62 Wis. 207, 22 N. W. 472, 51 Am. Rep. 722; *Freeman v. Mercantile Mut. Acc. Ass'n*, 156 Mass. 351, 30 N. E. 1013, 17 L. R. A. 753. So if the person injured employs a competent physician or surgeon, who, however, treats the case unskillfully, whereby increased suffering, or even death, results, the party causing the injury is responsible for these effects. *Sauter v. N. Y. C. & H. R. Co.*, 66 N. Y. 50, 23 Am. Rep. 18; *Tuttle v. Farmington*, 58 N. H. 13; *Stover v. Bluehill*, 51 Me. 439; *Loeser v. Humphrey*, 41 Ohio St. 378, 52 Am. Rep. 86;

*Pullman Car Co. v. Bluhm*, 109 Ill. 20, 50 Am. Rep. 601; *Nagel v. Mo. Pac. R. Co.*, 75 Mo. 653, 42 Am. Rep. 418. But where a passenger was injured by a collision between railroad trains, and in consequence became insane, and eight months afterwards committed suicide, it was held that not the injury, but his own act, was the proximate cause of his death. *Scheffer v. Railroad Co.*, 105 U. S. 249, 26 L. Ed. 1070; cf. *Washington & G. R. Co. v. Hickey*, 166 U. S. 521, 17 Sup. Ct. 661, 41 L. Ed. 1101; *Seifter v. Brooklyn Heights R. Co.*, 169 N. Y. 254, 62 N. E. 349; *Sullivan v. Tioga R. Co.*, 112 N. Y. 643, 20 N. E. 569, 8 Am. St. Rep. 793.

II. Though, in general, a liability arising in *contract* must be enforced by an action *ex contractu*, and a liability arising in *tort* by an action *ex delicto*, yet there is an intermediate class of cases in which there may be a choice between these forms of remedy. Thus a certain relation between parties may be created by contract, as, e. g., of carrier and passenger, of attorney and client, of physician and patient, of master and servant, etc.; and then, as the *law* prescribes, upon the creation of such a relation, what the respective duties of the parties are, an action *ex delicto* is maintainable if any such duty be violated, since, in reality, the duty is *created by the law*, and *not by the contract*. The contract furnishes the *occasion* upon which the duty becomes operative, but does not really create the obligation. But, on the other hand, as the contract is made in contemplation of the legal duty, and with a view to its performance, an action *ex contractu* is, from this point of view, maintainable. These rules have been often applied to the relation of carrier and passenger [*Atlantic & P. R. Co. v. Laird*, 164 U. S. 395, 17 Sup. Ct. 120, 41 L. Ed. 485; *Poulin v. Canadian Pac. R. Co. (C. C.)* 47 Fed. 858; *Carroll v. Staten Island R. Co.*, 58 N. Y. 126, 17 Am. Rep. 221; *Delaware, L. & W. R. Co. v. Trautwein*, 52 N. J. Law, 169, 19 Atl. 178, 7 L. R. A. 435, 19 Am. St. Rep. 442; *Ames v. Union Railway*, 117 Mass. 541, 19 Am. Rep. 426; *Taylor v. Manchester, etc., R. Co. (1895)* 1 Q. B. 134]; of carrier and shipper of goods [*Merritt v. Earle*, 29 N. Y. 115, 86 Am. Dec. 292; *Balt. & O. R. Co. v. Pumphrey*, 59 Md. 390]; of physician and patient, skilled workmen and their employers, etc. [*Kuhn v. Brownfield*, 34 W. Va. 252, 12 S. E. 519, 11 L. R. A. 700; *Pike v. Honsinger*, 155 N. Y. 201, 49 N. E. 760, 63 Am. St. Rep. 655]. That it is the *law* in such cases, and *not the contract*, that really creates the duty, is shown by the fact that when the service is rendered *gratuitously*, as, e. g., when a passenger is carried without payment of fare, the liability attaches, if the duty be violated [*Carroll v. Staten Island R. Co.*, *supra*; *Phila. & R. R. Co. v. Derby*, 14 How. 468, 14 L. Ed. 502; *Littlejohn v. Railroad Co.*, 148 Mass. 478, 20 N. E. 103, 2 L. R. A. 502; *Nugent v. Boston, C. & M. R. Co.*, 80 Me. 62, 73, 12 Atl. 797, 6 Am. St. Rep. 151]; and so when lawyers or physicians render their services gratuitously. Wharton on Negligence (2d Ed.) § 437.

The distinction is said to be this: "If the cause of complaint be for an act of omission or nonfeasance which, without proof of a contract to do what has been left undone, would not give rise to any cause of action (because no duty apart from contract to do what is complained of exists), then the action is founded upon contract, and not upon tort. If, on the other hand, the relation of the plaintiff and the defendant be such that a duty arises from that relationship, irrespective of contract, to take due care, and the defendant is negligent, then the action is one of tort." *Kelly v. Metrop. R. Co. [1895]* 1 Q. B. 944, 946; *Atlantic & P. R. Co. v. Laird*, 164 U. S. 393, 399, 17 Sup. Ct. 120, 41 L. Ed. 485; cf. *Nevin v. Pullman Car Co.*, 106 Ill. 222, 46 Am. Rep. 688.)

In some cases a plaintiff, instead of suing *ex delicto* for a tort, may waive the tort and sue *ex contractu* upon an implied contract.

(121 N. Y. 161, 24 N. E. 272, 8 L. R. A. 216, 18 Am. St. Rep. 803.)

TERRY et al. v. MUNGER (in part).

(Court of Appeals of New York. April 15, 1890.)

1. CONVERSION—WAIVER OF TORT—ACTION EX CONTRACTU.

The owner of goods wrongfully taken, which still remain in the wrong-doers' possession, may waive the tort, and sue on an implied contract of sale, in which event title to the goods passes to the wrong-doers.

2. SAME—ELECTION OF ACTION.

The bringing of an *ex contractu* action by the owner against some of the wrong-doers is a final election to treat the transaction as a sale, and he cannot subsequently sue the others for conversion.

Appeal from Supreme Court, General Term, Fifth Department.

PECKHAM, J. The plaintiffs commenced an action heretofore against two other persons, named, respectively, Kipp and Munger, on account of the same transaction for which this action was brought against the above-named sole defendant. The character of the complaint in that action was before this court, and the case is reported in 88 N. Y. 629, [Goodwin v. Griffis.] The defendants in that case were charged with detaching and carrying away from the mill the machinery in question in that case, and also in this, and using it for themselves. It was there held, upon a perusal of the complaint, that the action was of a nature *ex contractu*, and not *ex delicto*, for the wrong done plaintiffs by the conversion of their property. As the defendants therein had not, after their conversion of it, themselves sold or otherwise disposed of the property which they acquired from the plaintiffs, the fiction of the receipt by defendants of money for the sale of the property, which *ex æquo et bono* they ought to pay back to plaintiffs, and which they therefore impliedly promised to pay back, could not be indulged in, and the position of the parties would have been at one time the subject of some doubt, whether there was any foundation for the doctrine of an implied promise in such case, or any possibility of the waiver of the tort committed by the defendants in the conversion of the property. In some of the states it has been denied, and such denial placed upon the ground that the property remained in the hands of the wrong-doer, and therefore, no money having been received by him in fact, an implied promise to pay over money had and received by defendant to the plaintiff's use did not and could not arise. Such was the case of *Jones v. Hoar*, 5 Pick. 285. But the great weight of authority in this country is in

favor of the right to waive the tort, even in such case. If the wrong-doer has not sold the property, but still retains it, the plaintiff has the right to waive the tort, and proceed upon an implied contract of sale to the wrong-doer himself, and in such event he is not charged as for money had and received by him to the use of the plaintiff. The contract implied is one to pay the value of the property as if it had been sold to the wrong-doer by the owner. If the transaction is thus held by the plaintiff as a sale, of course the title to the property passes to the wrong-doer, when the plaintiff elects to so treat it. See *Pom. Rem.* (2d Ed.) §§ 567-569; *Putnam v. Wise*, 1 Hill, 234, 240, 37 Am. Dec. 309, and note by Mr. Hill; *Berly v. Taylor*, 5 Hill, 577, 584; *Norden v. Jones*, 33 Wis. 600, 605, 14 Am. Rep. 782; *Cummings v. Vorce*, 3 Hill, 283; *Spoor v. Newell*, Id. 307; *Abbott v. Blossom*, 66 Barb. 353. We think this rule should be regarded as settled in this state. The reasons for the contrary holding are as well stated as they can be in the case above cited from Massachusetts, (5 Pick.,) and some of the cases looking in that direction in this state are cited in the opinion of Talcott, J., in the case reported in 66 Barb., supra. We think the better rule is to permit the plaintiff to elect, and to recover for goods sold, even though the tort-feasor has not himself disposed of the goods.

There is no doubt that the complaint in the former case, reported in 88 N. Y., proceeded upon the theory of a sale of the property to the defendants in that action, and it was so construed by this court, and we have no inclination to review the correctness of that decision. We have then, the fact that the defendants in that action were sued by the plaintiffs herein, upon an implied contract to pay the value of the property taken by them, as upon a sale thereof by plaintiffs to them. The plaintiffs having treated the title to the property as having passed to the defendants in that suit by such sale, can the plaintiffs now maintain an action against another person, who was not a party to that action, to recover damages from him for his alleged conversion of the same property, which conversion is founded upon his participation in the same acts which plaintiffs in the old suit have already treated as constituting a sale of the property? We think not. The judgment roll in the former action was received in evidence upon the trial of this case, against the objection of the plaintiffs, and notwithstanding the fact that the defendant herein was not a party to such action. It appears that all the facts surrounding the transaction as to the taking of the property were known to the plaintiffs at the time when they commenced their action on the implied contract of sale.

The plaintiffs having, by their former action, in effect sold this very property, it must follow that at the time of the commencement of this one they had no cause of action for a conversion in existence against the defendant herein. The transfer of the title did not depend upon

the plaintiffs recovering satisfaction in such action for the purchase price. It was their election to treat the transaction as a sale which accomplished that result, and that election was proved by the complaint already referred to.

Judgment affirmed.

(The authorities are agreed that if a person converting personal property disposes of it for money or its equivalent, he may be sued *in tort* for the *conversion*, or *in contract* for *money had and received* [Cooley on Torts (2d Ed.) 109; 2 Greenl. Ev. § 108; Whilden v. Merchants' & Planters' Bank, 64 Ala. 1, 38 Am. Rep. 1; St. John v. Antrim Co., 122 Mich. 68, 80 N. W. 998]; but in a number of the states the doctrine established in New York by Terry v. Munger, ante, p. 139, that if the property is not disposed of, but retained, an action *ex contractu* will lie, upon an implied sale, is still denied [Quimby v. Lowell, 89 Me. 547, 36 Atl. 902; Smith v. Smith, 43 N. H. 536; Saville v. Welch, 58 Vt. 683, 5 Atl. 491; Glass Co. v. Wolcott, 2 Allen, 227, 79 Am. Dec. 787; Sandeen v. Kansas City, St. J. & C. B. R. Co., 79 Mo. 278]. Many of the states, however, adopt the New York rule. Moore v. Richardson, 68 N. J. Law, 305, 53 Atl. 1032; Lehmann v. Schmidt, 87 Cal. 15, 25 Pac. 161; Challiss v. Wylie, 35 Kan. 506, 11 Pac. 438; Downs v. Finnegan, 58 Minn. 112, 59 N. W. 981, 49 Am. St. Rep. 488; Walker v. Duncan, 68 Wis. 624, 32 N. W. 689; Crown Cycle Co. v. Brown, 39 Or. 285, 64 Pac. 451, and cases cited; cf. Evans v. Miller, 58 Miss. 120, 38 Am. Rep. 313; see 15 Am. & Eng. Enc. of Law [2d Ed.] 1116. In some states the general doctrine is pushed farther still, and an action on an implied contract will lie where a trespasser has severed trees from land in possession of the owner, or has quarried stone thereon, and has afterwards taken the trees or stone away. Downs v. Finnegan, supra; Phelps v. Church of Our Lady, 99 Fed. 683, 40 C. C. A. 72; Id., 115 Fed. 883, 53 C. C. A. 407. If, however, these acts of taking trees, stone, etc., are sufficient to create adverse possession of the land, so that a question of title is raised, an action *ex contractu* will not lie, for *title to land* cannot be tried in such an action. Id. So, if a trespass on land is committed, the landowner cannot waive the trespass and sue the trespasser on contract for use and occupation [Commonwealth Ins. & Trust Co. v. Dokko, 71 Minn. 533, 74 N. W. 891; Lockwood v. Thunder Bay Boom Co., 42 Mich. 536, 4 N. W. 292; Janouch v. Pence (Neb.) 93 N. W. 217; 15 Am. & Eng. Enc. of Law (2d Ed.) 1117, 1118]; nor, in general, can an action *ex contractu* be brought for a mere naked trespass on land without benefit to the trespasser, unless a statute (as sometimes happens) otherwise prescribes [St. John v. Antrim Co., 122 Mich. 68, 80 N. W. 998; Downs v. Finnegan, supra; Fanson v. Linsley, 20 Kan. 235]. As to choosing between an action in tort for *deceit* and an action in contract, see Hanrahan v. Nat. Bldg. & Loan Ass'n, 67 N. J. Law, 526, 51 Atl. 480, affirmed 68 N. J. Law, 730, 54 Atl. 1124; Hallett v. Gordon, 128 Mich. 364, 87 N. W. 261; Crown Cycle Co. v. Brown, 39 Or. 285, 64 Pac. 451. As to the general doctrine of "waiving a tort," see Cooper v. Cooper, 147 Mass. 370, 373, 17 N. E. 892, 9 Am. St. Rep. 721; Bigby v. U. S., 188 U. S. 400, 409, 23 Sup. Ct. 468, 47 L. Ed. 519.)

**So a tort, as a violation of legal duty, may involve, as one of its elements, a breach of contract.**

(87 N. Y. 382.)

**RICH v. NEW YORK CENT. & H. R. R. CO.** (In part).

(Court of Appeals of New York. January 17, 1882.)

**1. TORT INVOLVING BREACH OF CONTRACT.**

An omission to perform a contract obligation may constitute a tort, where that omission is also an omission of a legal duty; and such legal duty may arise, not merely out of relations of trust and confidence inherent in the nature of the contract itself, but may spring from extraneous circumstances, not constituting elements of the contract, as such, although connected with it and dependent upon it. The duty and the tort grow out of the entire range of facts, of which the breach of contract is but one.

**2. SAME—FRAUD—EVIDENCE.**

The complaint, in an action against a railroad company, alleged, in substance, that land owned by plaintiff, very valuable, but heavily mortgaged, had greatly depreciated in value in consequence of the removal of defendant's depot from the vicinity, and could only be restored to something like its former value, and saved from the sacrifice of a foreclosure in a time of depression, by the prompt return of the depot to its former site; that, to secure this result, plaintiff surrendered valuable riparian rights to defendant, upon its agreement to restore the depot as soon as practicable; but that, because of plaintiff's refusal to consent, without compensation for damages, to the closing of a street, which would have greatly injured his property, defendant, fully understanding plaintiff's situation, maliciously and willfully broke its agreement, and delayed a restoration of the depot, for the express purpose of preventing plaintiff from being enabled to ward off a foreclosure, and instigated a sale by the mortgagee under the foreclosure decree, at which the property was bid off by the mortgagee for a comparatively small sum; and thereupon the street was closed, the mortgagee having been induced to waive all damages therefor, and the depot was restored. At the trial, it was conceded that a good cause of action, sounding in tort, was stated in the complaint. *Held*, that one separate and distinct unlawful act was alleged, being the unreasonable delay in restoring the depot to its original location, which was unlawful, not inherently or in itself, but solely by force of the contract with plaintiff; but that, outside of and beyond this, there was an actual and affirmative fraud,—a scheme to accomplish a lawful purpose by unlawful means,—a fraudulent device to procure a ruinous foreclosure and thus remove the plaintiff as an obstacle, and that this scheme of oppression and fraud—the breach of contract being only one of its elements—constituted the tort; and that it was error to exclude, as immaterial, evidence offered by plaintiff to prove the agreement to restore the depot and its breach, the situation of the parties in respect of their several properties, the existence of the mortgage, and the instigation of the foreclosure by defendant, and statements by defendant's officers as to their reasons for refusing to restore the depot.

Appeal from Supreme Court, General Term, Second Department.  
Action by Josiah Rich against the New York Central & Hudson

River Railroad Company. The complaint alleged, in substance, that about the year 1850 plaintiff, with others who were the owners of certain lands in the village of Yonkers, entered into an agreement with the Hudson River Railroad Company to convey to said corporation a site for its depot, and fill in the same, and lay out and grade their lands so as to give convenient communication between the depot and the business portion of said village, said company agreeing to pay the actual cost of filling in the depot site, and to erect and ever after maintain its depot thereon; that said agreement was carried out, the site conveyed, and the depot erected; that defendant succeeded to the rights, franchises, and obligations of said Hudson River Railroad Company, and plaintiff acquired the titles of the other owners of said remaining lands; that there was a navigable inlet crossed by said railroad, known as the "Nepperhan" or "Saw-Mill" river; that said Hudson River Railroad Company, having no right to cut off or obstruct the navigation in said inlet, had constructed and maintained a draw-bridge over it; that it subsequently procured the passage of an act of the legislature, authorizing it to bridge said inlet without an opening or draw, on making compensation to the riparian owners; that defendant, to avoid the payment of such compensation, "resolved to accomplish the same object by artifice and strategy," and so threatened said riparian owners that, unless they would surrender their rights, and consent to the construction of such bridge, it would remove its depot, and, upon said owners refusing so to do, did remove its depot to a point above a third of a mile north; that plaintiff, a short time previous to the threatened removal, had borrowed, on his bond secured by mortgage on his said lands, the sum of \$35,000, most of which was expended in erecting stores on his said lands, directly opposite and about 100 feet south of said depot, and, if the depot had not been removed, could have rented said stores and the adjacent lots for \$5,000 per annum, and could have sold other lots for sufficient to pay off said mortgage, but that in consequence of such removal his premises became wholly unproductive and unsalable; that, in order to have the depot restored to its original site and to save his property from being sacrificed, he was induced and coerced into giving his consent to the closing of said draw-bridge, and an agreement was entered into on March 7, 1877, by which defendant, in consideration of such consent, agreed that it would, "as soon as practicable, and within a reasonable time, build and forever thereafter maintain its principal passenger depot for Yonkers" upon said original site; that defendant thereupon removed the drawbridge, and erected a permanent bridge over the inlet; that it also erected a new depot on the old site, and had the same ready for use about April 15, 1878, but absolutely refused to open or establish its depot there unless the common council of Yonkers would pass an ordinance declaring and ordering the closing of a portion of a street which crossed its tracks,

so that it could build a fence inclosing said tracks, which would so exclude the plaintiff and others from the right and privilege of crossing said tracks to the steam-boat docks on the Hudson river; that defendant procured the passage of an act of the legislature amending the charter of Yonkers, so as to provide for the assessment and payment of damages claimed by the owners of land injuriously affected by the closing of a street; that the closing of said street would have damaged plaintiff's property to, at least, the sum of \$50,000, and would have neutralized, in great measure, all the benefits derived from the restoration of the depot; that plaintiff and others sent in remonstrances to the common council against such discontinuance, and it refused to pass an ordinance to that effect, because of the large amount of damages the city would have to pay; that, upon such refusal being made known, defendant's officers publicly asserted that it would never open said new depot until said ordinance was passed, and would tear down the new depot, or use it exclusively for freight, "in all of which the defendant was actuated by malice and vindictiveness towards plaintiff, and a design to crush, ruin, and destroy him;" that in consequence of the removal of the depot, and the consequent unproductiveness of plaintiff's property, he was unable to pay the interest on said bond and mortgage, and foreclosure was commenced, and a decree of foreclosure and sale was made, but that the mortgagee had forbore selling to give plaintiff the benefit of the re-establishment of the depot; that defendant's officers and agents, after the refusal of the common council to pass the said ordinance, called upon the mortgagee, and induced it "to withdraw the grace and favor" accorded to plaintiff and to advertise the property immediately for sale, so as to cut off plaintiff's claim for damages, the mortgagee having been induced to waive any such claim; that the "scheme or plan which had been so concocted and arranged by and in the interest and for the special benefit and advantage of the defendant, to enable it to evade and violate with impunity its aforesaid covenant and obligation with the plaintiff, \* \* \* and to escape the payment of its fair and just proportion of the plaintiff's damages on the closing of said street, was fully carried out and executed by the instigation and connivance of the defendant;" that plaintiff's entire property was sold under said decree, and bid off by the mortgagee for \$20,000, and thereupon the ordinance was passed closing said street, and defendant immediately opened the new depot; and that "defendant, by means of the wrongs, injuries, and grievances aforesaid, and its malicious and unlawful actions in doing as aforesaid, has inflicted pecuniary loss and damage upon the plaintiff to the amount of \$150,000;" for which sum judgment was asked.

At the trial plaintiff offered in evidence the agreement of 1877, which was objected to and excluded as irrelevant and incompetent. Plaintiff also offered to show the alleged breach of that contract, the

value of the property conveyed to defendant, and the establishment of the depot originally thereon; that defendant caused and procured the sale of plaintiff's property under the foreclosure decree to deprive him of his claim for damages for closing the street; that it was sold for less than one-fifth of its value; that plaintiff was dispossessed at the instigation of defendant; and that if the depot had been re-established the market value of the property would have been largely increased. Plaintiff also offered to prove an interview with defendant's officers in reference to the removal and re-establishment of the depot, and the reasons they assigned for the removal and refusal to restore it, and also the amount of damage sustained by plaintiff in consequence of defendant's omission and refusal to re-establish the depot under the agreement of 1877, all of which was objected to and excluded on the same ground.

Defendant moved for a dismissal of the complaint on the following grounds: "First. Because the plaintiff has not laid the foundation, by any of the several agreements in evidence, to sustain a cause of action for damages arising from any wrongful act of the defendant in respect to the property of the plaintiff. Second. Because the gist of this action is the malicious and unlawful acts of the defendant in pursuing a scheme or plan to injure the plaintiff by depriving him of his property, based upon an alleged malicious violation of certain alleged contracts. The proof offered fails to make out any cause of action as set forth in the complaint, and would not sustain any verdict against the defendant for any damages in this action. Third. Because the complaint sets forth but a single cause of action, and the plaintiff cannot legally found a claim for damages upon the alleged breach of any one of the several agreements or contracts referred to."

The motion was granted, and judgment for defendant was entered on the dismissal of the complaint, which, on appeal therefrom by plaintiff, was affirmed by the general term. Plaintiff appealed from the judgment of the general term.

FINCH, J. We have been unable to find any accurate and perfect definition of a "tort." Between actions plainly *ex contractu* and those as clearly *ex delicto* there exists what has been termed a "borderland," where the lines of distinction are shadowy and obscure, and the tort and the contract so approach each other, and become so nearly coincident, as to make their practical separation somewhat difficult. Moak's Underh. Torts, 23. The text-writers either avoid a definition entirely, (Addison on Torts;) or frame one plainly imperfect, (2 Bouv. Law Dict. 600;) or depend upon one which they concede to be inaccurate, but hold sufficient for judicial purposes, (Cooley, Torts, 3, note 1; Moak's Underh. Torts, 4; 1 Hil. Torts, 1.) By these last authors a tort is described in general as "a wrong independent of contract." And yet, it is conceded that a tort may grow

out of, or make part of, or be coincident with, a contract, (2 Bouvier, *supra*;) and that precisely the same state of facts between the same parties may admit of an action either *ex contractu* or *ex delicto*, (Cooley, *Torts*, 90.) In such cases the tort is dependent upon, while at the same time independent of, the contract; for if the latter imposes the legal duty upon a person, the neglect of that duty may constitute a tort founded upon a contract. 1 *Add. Torts*, 13. Ordinarily, the essence of a tort consists in the violation of some duty due to an individual, which duty is a thing different from the mere contract obligation. When such duty grows out of relations of trust and confidence, as that of the agent to his principal or the lawyer to his client, the ground of the duty is apparent, and the tort is, in general, easily separable from the mere breach of contract. But where no such relation flows from the constituted contract, and still a breach of its obligation is made the essential and principal means, in combination with other and perhaps innocent acts and conditions, of inflicting another and different injury, and accomplishing another and different purpose, the question whether such invasion of a right is actionable as a breach of contract only, or also as a tort, leads to a somewhat difficult search for a distinguishing test.

In the present case, the learned counsel for the respondent seems to free himself from the difficulty by practically denying the existence of any relation between the parties except that constituted by the contract itself, and then, insisting that such relation was not of a character to originate any separate and distinct legal duty, argues that, therefore, the bare violation of the contract obligation created merely a breach of contract, and not a tort. He says that the several instruments put in evidence showed that there never had been any relation between the plaintiff and the railroad company, except that of parties contracting in reference to certain specific subjects, by plain and distinct agreements, for any breach of which the parties, respectively, would have a remedy, but none of which created any such rights as to lay the foundation for a charge of willful misconduct or any other tortious act. Upon this theory, the case was tried. Every offer to prove the contracts, and especially their breach, was resisted upon the ground that the complaint, through all its long history of plaintiff's grievances, alleged but a single cause of action, and that for a tort, and therefore something else, above and beyond and outside of a mere breach of contract, must be shown, and proof of such breach was immaterial. And in the end the plaintiff was nonsuited because he had given no proof of a tort or a fraud. He now insists that he was first debarred from giving such proof, and then nonsuited because he had not given it.

At the foundation of every tort must lie some violation of a legal duty, and therefore some unlawful act or omission. Cooley, *Torts*, 60. The one separate and distinct unlawful act or omission alleged

in this complaint, or rather the only one so separable which we can see may have been unlawful, was the unreasonable delay in restoring the depot to its original location; and that was unlawful, not inherently or in itself, but solely by force of the contract with plaintiff. The instigation of the sale on foreclosure, as a separate fact, may have been unkind, or even malicious, but cannot be said to have been unlawful. The mortgagee had a perfect right to sell, judicially established, and what it might lawfully do it was not unlawful to ask it to do. The act of instigating the sale may be material, and have force, as one link in a chain of events, and as serving to explain and characterize an unlawful purpose, pursued by unlawful means; but, in and of itself, it was not an unlawful act, and cannot serve as the foundation of a tort. *Randall v. Hazelton*, 12 Allen, 412. We are forced back, therefore, to the contract for re-establishing the depot, and its breach, as the basis or foundation of the tort pleaded. If that will not serve the purpose in some manner, by some connection with other acts and conditions, then there was no cause of action for a tort stated in the complaint. We are thus obliged to study the doctrine advanced by the respondent, and measure its range and extent. It rests upon the idea that, unless the contract creates a relation, out of which relation springs a duty, independent of the mere contract obligation, though there may be a breach of the contract, there is no tort, since there is no duty to be violated. And the illustration given is the common case of a contract of affreightment, where, beyond the contract obligation to transport and deliver safely, there is a duty, born of the relation established, to do the same thing. In such a case, and in the kindred cases of principal and agent, of lawyer and client, of consignor and factor, the contract establishes a legal relation of trust and confidence; so that, upon a breach of the contract, there is not merely a broken promise, but, outside of and beyond that, there is trust betrayed and confidence abused. There is constructive fraud, or a negligence that operates as such; and it is that fraud and that negligence which, at bottom, make the breach of contract actionable as a tort. *Coggs v. Bernard*, 2 Ld. Raym. 909; *Orange Bank v. Brown*, 3 Wend. 161, 162.

So far we see no reason to disagree with the learned counsel for the respondent save in one respect, but that is a very important one. Ending the argument at this point leaves the problem of the case still unsolved. If a cause of action for a tort, as admitted, was stated in the complaint, it helps us but little to learn what it was not, and that it does not fall within a certain class of exceptional cases, and cannot be explained by them. We have yet to understand what it is, if it exists at all, as a necessary preliminary to any just appreciation of the relevancy or materiality of the rejected evidence. The general term, as we have remarked, described the tort pleaded as a "clear case of fraud." If that be true, it cannot depend upon a fiduciary or other

character of the relation constituted by the contract merely, for no such relations existed; and there must be some other relation not created by the contract alone, from which sprang the duty which was violated. Let us analyze the tort alleged somewhat more closely.

At the date of the contract, the complaint shows the relative situation and needs of the two parties. The railroad company desired to close the draw over the Nepperhan river, and substitute a solid bridge. With the growth of its business and the multitudes of its trains the draw had become a very great evil and a serious danger. The effort to dispense with it was in itself natural and entirely proper. On the other hand, the plaintiff was both a riparian owner above the draw, and likely to be injured in that ownership by a permanent bridge, and had suffered, and was still suffering, from a severe depreciation in the value of his property near Main street by the previous removal of the railroad station. The defendant was so far master of the situation that it could and did shut off the plaintiff to a choice of evils. He might insist upon the draw, and leave his mortgaged property to be lost from depreciation, and save his riparian rights, or he might surrender the latter to save the former. This last was the alternative which he selected, and the contract of 1877 was the result. In the making of this contract there was no deceit or fraud, and no legal or actionable wrong, on the part of the defendant. If it drove a hard bargain, and had the advantage in the negotiation, it at least invaded no legal right of the plaintiff, and he was free to contract or not, as he pleased. The complaint does not allege that at the execution of this agreement there was any purpose or intention of not fulfilling its terms. The tort, if any, originated later. What remains then is this: the railroad company conceived the idea of closing Main street to any travel where it passed their tracks at grade; of substituting a bridge crossing in its stead; and of fencing in its track along the street beneath, so as to compel access to the cars through its depot in such manner that the purchase of tickets could be compelled. This, in itself, was a perfectly lawful purpose. The grade crossing was a death trap, and the interest of the company and the safety of individuals alike made a change desirable, and the closing in of the depot was in no sense reprehensible. But there was a difficulty in the way. The plaintiff again stood as an obstacle in the path. The closing of Main street, though beneficial to the company, was to him and his adjoining property claimed to be a very serious injury. He declined to consent, except upon the condition of an award of heavy damages, and in dread of that peril the common council refused to pass the necessary ordinance. At this point, according to the allegations of the complaint, if at all or ever, arose the tort. It is alleged that the defendant, in order to reach a lawful result, planned a fraudulent scheme for its accomplishment by unlawful means, and through an injury to the plaintiff, which would strip him

of his damages by a complete sacrifice of his property. That plan was executed in this manner: The company willfully and purposely refused to perform its contract. It had built its permanent bridge over the Nepperhan, and so received the full consideration of its promise; its new depot was substantially finished and ready for occupation; and no just reason remained why its contract should not be fulfilled. But the company refused. It did not merely neglect or delay; it openly and publicly refused. The purpose of that public refusal was apparent. It was to drive the plaintiff's mortgagee to a foreclosure; it was to shut out from plaintiff that appreciation of his property which would enable him to save it; it was to strip him of it, so as to extinguish the threatened damages, and thus procure the assent of the common council, and get Main street closed. This unlawful refusal to perform the contract, this deliberate announcement of the purpose not to restore the depot, was well calculated to influence the mortgagee towards a foreclosure. But the defendant's direct instigation was added. The foreclosure came; the mortgagee bid in the property at a sacrifice; swiftly followed a release of damages, an ordinance of the common council, the closing of Main street, and then the restoration of the depot.

We are thus able to see what the tort pleaded was. It was not a constructive fraud, drawn from a violation of a duty imposed by law out of some specific relation of trust and confidence, but an actual and affirmative fraud,—an alleged scheme to accomplish a lawful purpose by unlawful means. There was here, on the theory of the complaint, something more than a mere breach of contract. That breach was not the tort; it was only one of the elements which constituted it. Beyond that, and outside of that, there was said to have existed a fraudulent scheme and device by means of that breach to procure the foreclosure of the mortgage at a particular time and under such circumstances as would make that foreclosure ruinous to the plaintiff's rights, and remove him as an obstacle by causing him to lose his property, and thereby his means of resistance to the purpose ultimately sought. In other words, the necessary theory of the complaint is that a breach of contract may be so intended and planned; so purposely fitted to time and circumstances and conditions; so interwoven into a scheme of oppression and fraud; so made to set in motion innocent causes which otherwise would not operate,—as to cease to be a mere breach of contract, and become, in its association with the attendant circumstances, a tortious and wrongful act or omission.

It may be granted that an omission to perform a contract obligation is never a tort, unless that omission is also an omission of a legal duty. But such legal duty may arise, not merely out of certain relations of trust and confidence, inherent in the nature of the contract itself, as in the case referred to in the respondent's argu-

ment, but may spring from extraneous circumstances, not constituting elements of the contract as such, although connected with and dependent upon it, and born of that wider range of legal duty which is due from every man to his fellow, to respect his rights of property and person, and refrain from invading them by force or fraud.

It is then doubtless true that a mere contract obligation may establish no relation out of which a separate or specific legal duty arises, and yet extraneous circumstances and conditions, in connection with it, may establish such a relation as to make its performance a legal duty, and its omission a wrong to be redressed. The duty and the tort grow out of the entire range of facts, of which the breach of the contract was but one. The whole doctrine is accurately and concisely stated in 1 Chit. Pl. 135, that, "if a common-law duty result from the facts, the party may be sued in tort for any negligence or misfeasance in the execution of the contract."

Assuming, now, that we correctly understand what the tort pleaded was, and which was conceded to constitute a cause of action, it seems to us quite clear that the plaintiff was improperly barred from proving it. From the very nature of the case, a fraud can seldom be proved directly, and almost uniformly is an inference from the character of the whole transaction, and the surrounding and attendant circumstances. Proof of the contract, and its breach, of the delay in restoring of the depot, and the reasons therefor, were essential links in the chain. If the proof should go no further, a nonsuit would be proper, but without these elements the tort alleged could not be established at all. And so the situation of the parties as it respected their several properties, the existence of the mortgage, the agreement to postpone the sale, were elements of the transaction proper to be shown.

The judgment should be reversed, and a new trial granted, costs to abide the event. All concur, except RAPALLO and MILLER, JJ., not voting.

Judgment reversed.

**In cases of contract, where no legal duty arises independent of contract, one not in privity with the defendant cannot recover against him in tort.**

(10 Mees. & W. 109.)

**WINTERBOTTOM v. WRIGHT.**

(Court of Exchequer. June 6, 1842.)

**CONTRACTOR'S LIABILITY FOR INJURY TO THIRD PERSON—PRIVITY.**

Defendant contracted with the postmaster general to provide a mail-coach to convey the mail between two places, and other persons contracted to supply horses and coachmen for the same purpose, and hired plaintiff to drive the coach. Plaintiff, while driving the coach, was injured by its breaking down from latent defects in its construction. *Held*, that plaintiff could not maintain an action against defendant for such injury, there being no privity of contract between them.

**Demurrer to pleas.**

Action on the case. The declaration stated that the defendant was a contractor for the supply of mail-coaches, and had in that character contracted for hire and reward, with the postmaster general, to provide the mail-coach for the purpose of conveying the mail-bags from Hartford, in the county of Chester, to Holyhead; that the defendant, under and by virtue of the said contract, had agreed with the said postmaster general that the said mail-coach should, during the said contract, be kept in a fit, proper, safe, and secure state and condition for the said purpose, and took upon himself, to-wit, under and by virtue of the said contract, the sole and exclusive duty, charge, care, and burden of the repairs, state, and condition of the said mail-coach; and it had become and was the sole and exclusive duty of the defendant, to-wit, under and by virtue of his said contract, to keep and maintain the said mail-coach in a fit, proper, safe, and secure state and condition for the purpose aforesaid; that Nathaniel Atkinson and other persons, having notice of the said contract, were under contract with the postmaster general to convey the said mail-coach from Hartford to Holyhead, and to supply horses and coachmen for that purpose, and also not, on any pretense whatever, to use or employ any other coach or carriage whatever than such as should be so provided, directed, and appointed by the postmaster general; that the plaintiff, being a mail-coachman, and thereby obtaining his livelihood, and while the said several contracts were in force, having notice thereof, and trusting to and confiding in the contract made between the defendant and the postmaster general, and believing that the said coach was in a fit, safe, secure, and proper state and condition for the purpose aforesaid, and not knowing and having no means of knowing to the

contrary thereof, hired himself to the said Nathaniel Atkinson and his co-contractors as mail-coachman, to drive and take the conduct of the said mail-coach, which but for the said contract of the defendant he would not have done. The declaration then averred that the defendant so improperly and negligently conducted himself, and so utterly disregarded his aforesaid contract, and so wholly neglected and failed to perform his duty in this behalf, that heretofore, to-wit, on the 8th of August, 1840, while the plaintiff, as such mail-coachman, so hired, was driving the said mail-coach from Hartford to Holyhead, the same coach being a mail-coach, found and provided by the defendant under his said contract, and the defendant then acting under his said contract, and having the means of knowing and then well knowing all the aforesaid premises, the said mail-coach being then in a frail, weak, infirm, and dangerous state and condition, to-wit, by and through certain latent defects in the state and condition thereof, and unsafe and unfit for the use and purpose aforesaid, and from no other cause, circumstance, matter or thing whatsoever, gave way and broke down, whereby the plaintiff was thrown from his seat, and, in consequence of injuries then received, had become lamed for life. To this declaration the defendant pleaded several pleas, to two of which there were demurrers; but, as the court gave no opinion as to their validity, it is not necessary to state them.

Mr. Peacock, in support of the demurrers, argued against the sufficiency of the pleas.

Mr. Byles, for the defendant, objected that the declaration was bad in substance. This is an action brought, not against Atkinson and his co-contractors, who were the employers of the plaintiff, but against the person employed by the postmaster general, and totally unconnected with them or with the plaintiff. Now, it is a general rule that, wherever a wrong arises merely out of the breach of a contract, which is the case on the face of this declaration, whether the form in which the action is conceived be *ex contractu* or *ex delicto*, the party who made the contract alone can sue. *Tollit v. Sherstone*, 5 Mees. & W. 283. If the rule were otherwise, and privity of contract were not requisite, there would be no limit to such actions. If the plaintiff may, as in this case, run through the length of three contracts, he may run through any number or series of them, and the most alarming consequences would follow the adoption of such a principle. For example, every one of the sufferers by such an accident as that which recently happened on the Versailles Railway might have his action against the manufacturer of the defective axle. So, if the chain cable of an East India-man were to break, and the vessel went aground, every person affected, either in person or property, by the accident, might have an action against the manufacturer, and perhaps against every seller

also of the iron. Again, suppose a gentleman's coachman were injured by the breaking down of his carriage, if this action be maintainable, he might bring his action against the smith or the coachmaker, although he could not sue his master, who is the party contracting with him. *Priestley v. Fowler*, 3 Mees. & W. 1. There is no precedent to be found of such a declaration, except one in 8 Wentworth, Pleading, 397, which has been deemed very questionable. *Rapson v. Cubitt*, 9 Mees. & W. 710, is an authority to show that the party injured by the negligence of another cannot go beyond the party who did the injury, unless he can establish that the latter stood in the relation of a servant to the party sued. In *Witte v. Hague*, 2 Dowl. & R. 33, where the plaintiff sued for an injury produced by the explosion of a steam-engine boiler, the defendant was personally present managing the boiler at the time of the accident. *Levy v. Langridge*, 4 Mees. & W. 337, will probably be referred to on the other side. But that case was expressly decided on the ground that the defendant who sold the gun by which the plaintiff was injured, although he did not personally contract with the plaintiff, who was a minor, knew that it was bought to be used by him. Here there is no allegation that the defendant knew that the coach was to be driven by the plaintiff. There, moreover, fraud was alleged in the declaration, and found by the jury, and there, too, the cause of injury was a weapon of a dangerous nature, and the defendant was alleged to have had notice of the defect in its construction. Nothing of that sort appears upon this declaration.

Mr. Peacock, contra.

This case is within the principle of the decision in *Levy v. Langridge*, 4 Mees. & W. 337. Here the defendant entered into a contract with a public officer to supply an article which, if imperfectly constructed, was necessarily dangerous, and which, from its nature and the use for which it was destined, was necessarily to be driven by a coachman. That is sufficient to bring the case within the rule established by *Levy v. Langridge*. In that case the contract made by the father of the plaintiff with the defendant was made on behalf of himself and his family generally, and there was nothing to show that the defendant was aware even of the existence of the particular son who was injured. Suppose a party made a contract with government for a supply of muskets, one of which, from its misconstruction, burst and injured a soldier. There it is clear that the use of the weapon by a soldier would have been contemplated, although not by the particular individual who received the injury; and could it be said, since the decision in *Levy v. Langridge*, that he could not maintain an action against the contractor? So, if a coachmaker, employed to put on the wheels of a carriage, did it so negligently that one of them flew off, and a child of the owner were thereby injured, the damage being the natural and immediate con-

sequence of his negligence, he would surely be responsible. So, if a party entered into a contract to repair a church, a work-house, or other public building, and did it so insufficiently that a person attending the former, or a pauper in the latter, was injured by the falling of a stone, he could not maintain action against any other person than the contractor, but against him he must surely have a remedy. It is like the case of a contractor who negligently leaves open a sewer, whereby a person passing along the street is injured. It is clear that no action could be maintained against the postmaster general. *Hall v. Smith*, 2 Bing. 156; *Humphreys v. Mears*, 1 Man. & R. 187; *Priestley v. Fowler*, 3 Mees. & W. 1. But here the declaration alleges the accident to have happened through the defendant's negligence and want of care. The plaintiff had no opportunity of seeing that the carriage was sound and secure. [Alderson, B.: The decision in *Levy v. Langridge* proceeds upon the ground of the knowledge and fraud of the defendant.] Here also there was fraud: the defendant represented the coach to be in a proper state for use, and whether he represented that which is false within his knowledge, or a fact as true which he did not know to be so, it was equally a fraud in point of law, for which he is responsible.

ABINGER, C. B. I am clearly of opinion that the defendant is entitled to our judgment. We ought not to permit a doubt to rest upon this subject, for our doing so might be the means of letting in upon us an infinity of actions. This is an action of the first impression, and it has been brought in spite of the precautions which were taken in the judgment of this court in the case of *Levy v. Langridge*, 4 Mees. & W. 337, to obviate any notion that such an action could be maintained. We ought not to attempt to extend the principle of that decision, which, although it has been cited in support of this action, wholly fails as an authority in its favor; for there the gun was bought for the use of the son, the plaintiff in that action, who could not make the bargain himself, but was really and substantially the party contracting. Here the action is brought simply because the defendant was a contractor with a third person, and it is contended that thereupon he became liable to everybody who might use the carriage. If there had been any ground for such action, there certainly would have been some precedent of it; but, with the exception of actions against innkeepers and some few other persons, no case of a similar nature has occurred in practice. That is a strong circumstance, and is of itself a great authority against its maintenance. It is, however, contended that, this contract being made on the behalf of the public by the postmaster general, no action could be maintained against him, and therefore the plaintiff must have a remedy against the defend-

ant. But that is by no means a necessary consequence,—he may be remediless altogether. There is no privity of contract between these parties; and if the plaintiff can sue, every passenger, even any person passing along the road, who was injured by the upsetting of the coach, might bring a similar action. Unless we confine the operation of such contracts as this to the parties who entered into them, the most absurd and outrageous consequences, to which I can see no limit, would ensue. Where a party becomes responsible to the public, by undertaking a public duty, he is liable, though the injury may have arisen from the negligence of his servant or agent. So, in cases of public nuisances, whether the act was done by the party as a servant, or in any other capacity, you are liable to an action at the suit of any person who suffers. These, however, are cases where the real ground of the liability is the public duty, or the commission of the public nuisance. There is also a class of cases in which the law permits a contract to be turned into a tort; but, unless there has been some public duty undertaken, or public nuisance committed, they are all cases in which an action might have been maintained upon the contract. Thus a carrier may be sued either in *assumpsit* or *case*; but there is no instance in which a party, who was not privy to the contract entered into with him, can maintain any such action. The plaintiff in this case could not have brought an action on the contract. If he could have done so, what would have been his situation, supposing the postmaster general had released the defendant? That would, at all events, have defeated his claim altogether. By permitting this action, we should be working this injustice: that after the defendant had done everything to the satisfaction of his employer, and after all matters between them had been adjusted, and all accounts settled on the footing of their contract, we should subject them to be ripped open by this action of tort being brought against him.

ALDERSON, B. I am of the same opinion. The contract in this case was made with the postmaster general alone; and the case is just the same as if he had come to the defendant, and ordered a carriage, and handed it at once over to Atkinson. If we were to hold that the plaintiff could sue in such a case, there is no point at which such actions would stop. The only safe rule is to confine the right to recover to those who enter into the contract; if we go one step beyond that, there is no reason why we should not go fifty. The only real argument in favor of the action is that this is a case of hardship; but that might have been obviated, if the plaintiff had made himself a party to the contract. Then it is urged that it falls within the principle of the case of *Levy v. Langridge*. But the principle of that case was simply this: that, the father having bought the gun for the very purpose of being used by the plaintiff, the de-

fendant made representations by which he was induced to use it. There a distinct fraud was committed on the plaintiff. The falsehood of the representation was also alleged to have been within the knowledge of the defendant who made it, and he was properly held liable for the consequences. How are the facts of that case applicable to those of the present? Where is the allegation of misrepresentation or fraud in this declaration? It shows nothing of the kind. Our judgment must therefore be for the defendant.

ROLFE, B. The breach of the defendant's duty, stated in this declaration, is his omission to keep the carriage in a safe condition; and, when we examine the mode in which that duty is alleged to have arisen, we find a statement that the defendant took upon himself, to-wit, under and by virtue of the said contract, the sole and exclusive duty, charge, care, and burden of the repairs, state, and condition of the said mail-coach, and during all the time aforesaid it had become and was the sole and exclusive duty of the defendant, to-wit, under and by virtue of his said contract, to keep and maintain the said mail-coach in a fit, proper, safe, and secure state and condition. The duty, therefore, is shown to have arisen solely from the contract; and the fallacy consists in the use of that word "duty." If a duty to the postmaster general be meant, that is true; but if a duty to the plaintiff be intended, (and in that sense the word is evidently used,) there was none. This is one of those unfortunate cases in which there certainly has been *damnum*, but it is *damnum absque injuria*. It is, no doubt, a hardship upon the plaintiff to be without a remedy, but by that consideration we ought not to be influenced. Hard cases, it has been frequently observed, are apt to introduce bad law.

Judgment for the defendant.

(Supporting the same doctrine are *Standard Oil Co. v. Murray*, 119 Fed. 572, 57 C. C. A. 1; *Carter v. Harden*, 78 Me. 528, 7 Atl. 392; *Marvin Safe Co. v. Ward*, 46 N. J. Law, 19; *Losee v. Clute*, 51 N. Y. 494, 10 Am. Rep. 638; *Kuelling v. Roderick Mfg. Co.*, 88 App. Div. 309, 84 N. Y. Supp. 622; *Curtin v. Somerset*, 140 Pa. 70, 21 Atl. 244, 12 L. R. A. 322, 23 Am. St. Rep. 220; *Roddy v. Mo. Pac. R. Co.*, 104 Mo. 234, 15 S. W. 1112, 12 L. R. A. 746, 24 Am. St. Rep. 333; *Zieman v. Kieckhefer Elevator Co.*, 90 Wis. 497, 63 N. W. 1021; *Davidson v. Nichols*, 11 Allen, 514. The doctrine is fully considered and many illustrative cases cited in *Huset v. Case Machine Co.*, 120 Fed. 865, 57 C. C. A. 237, 61 L. R. A. 303.)

But if, in cases of contract, the law imposes a duty towards third persons who are not parties to the contract, such persons may recover in an action of tort.

(6 N. Y. 397, 57 Am. Dec. 455.)

THOMAS et al. v. WINCHESTER.

(Court of Appeals of New York. July, 1852.)

**BREACH OF CONTRACT INVOLVING VIOLATION OF LEGAL DUTY TO THIRD PERSONS—PRIVITY.**

Defendant, a manufacturer of and dealer in vegetable extracts for medicinal purposes, labeled and sold, as extract of dandelion, which is a harmless medicine, extract of belladonna, a poison, resembling in appearance the extract of dandelion; and, after it had passed through the hands of other dealers, a portion of it was sold and administered, as extract of dandelion, to a patient, who was seriously injured thereby. *Held*, that defendant was liable in damages to the person so injured, although there was no privity between them, on the ground of a breach of the duty arising out of the nature of defendant's business and the danger to others incident to its mismanagement.

Appeal from Supreme Court, General Term, Sixth District.

Action by Samuel Thomas and Mary Ann Thomas, his wife, against the defendants, Winchester and Gilbert, for injuries to the plaintiff Mrs. Thomas, alleged to have been caused by the negligence of defendants. At the trial a verdict was rendered for plaintiffs against the defendant Winchester only, the defendant Gilbert having been acquitted by direction of the judge. A motion by defendant Winchester for a new trial was denied, and judgment for plaintiffs was entered on the verdict. Defendant Winchester appealed from the judgment.

RUGGLES, C. J. This is an action brought to recover damages from the defendant for negligently putting up, labeling, and selling, as and for the extract of dandelion, which is a simple and harmless medicine, a jar of the extract of belladonna, which is a deadly poison; by means of which the plaintiff Mary Ann Thomas, to whom, being sick, a dose of dandelion was prescribed by a physician, and a portion of the contents of the jar was administered as and for the extract of dandelion, was greatly injured, etc. The facts proved were briefly these: Mrs. Thomas being in ill health, her physicians prescribed for her a dose of dandelion. Her husband purchased what was believed to be the medicine prescribed, at the store of Dr. Foord, a physician and druggist in Cazenovia, Madison county, where the plaintiffs reside. A small quantity of the medicine thus purchased was administered to Mrs. Thomas, on whom it produced very alarming effects; such as coldness of the surface and extrem-

ities, feebleness of circulation, spasms of the muscles, giddiness of the head, dilation of the pupils of the eyes, and derangement of mind. She recovered, however, after some time, from its effects, although for a short time her life was thought to be in great danger. The medicine administered was belladonna, and not dandelion. The jar from which it was taken was labeled, " $\frac{1}{2}$  lb. dandelion, prepared by A. Gilbert, No. 108 John street, N. Y.; jar, 8 oz." It was sold for and believed by Dr. Foord to be the extract of dandelion as labeled. Dr. Foord purchased the article as the extract of dandelion from James S. Aspinwall, a druggist at New York. Aspinwall bought it of the defendant as extract of dandelion, believing it to be such. The defendant was engaged at No. 108 John street, New York, in the manufacture and sale of certain vegetable extracts for medicinal purposes, and in the purchase and sale of others. The extracts manufactured by him were put up in jars for sale, and those which he purchased were put up by him in like manner. The jars containing extracts manufactured by himself and those containing extracts purchased by him from others were labeled alike. Both were labeled like the jar in question, "as prepared by A. Gilbert." Gilbert was a person employed by the defendant at a salary as an assistant in his business. The jars were labeled in Gilbert's name, because he had been previously engaged in the same business on his own account at No. 108 John street, and probably because Gilbert's labels rendered the articles more salable. The extract contained in the jar sold to Aspinwall, and by him to Foord, was not manufactured by the defendant, but was purchased by him from another manufacturer or dealer. The extract of dandelion and the extract of belladonna resemble each other in color, consistence, smell, and taste; but may, on careful examination, be distinguished, the one from the other, by those who are well acquainted with those articles. Gilbert's labels were paid for by Winchester, and used in his business, with his knowledge and assent.

The defendant's counsel moved for a nonsuit on the following grounds: (1) That the action could not be sustained, as the defendant was the remote vendor of the article in question; and there was no connection, transaction, or privity between him and the plaintiffs, or either of them. (2) That this action sought to charge the defendant with the consequences of the negligence of Aspinwall and Foord. (3) That the plaintiffs were liable to and chargeable with the negligence of Aspinwall and Foord, and therefore could not maintain this action. (4) That, according to the testimony, Foord was chargeable with negligence, and that the plaintiffs, therefore, could not sustain this suit against the defendant; if they could sustain a suit at all, it would be against Foord only. (5) That this suit being brought for the benefit of the wife, and alleging her as the meritorious cause of action, cannot be sustained. (6) That there was not

sufficient evidence of negligence in the defendant to go to the jury. The judge overruled the motion for a nonsuit, and the defendant's counsel excepted.

The judge, among other things, charged the jury that if they should find from the evidence that either Aspinwall or Foord was guilty of negligence in vending, as and for dandelion, the extract taken by Mrs. Thomas, or that the plaintiff Thomas, or those who administered it to Mrs. Thomas, were chargeable with negligence in administering it, the plaintiffs were not entitled to recover; but if they were free from negligence, and if the defendant Winchester was guilty of negligence in putting up and vending the extracts in question, the plaintiffs were entitled to recover, provided the extract administered to Mrs. Thomas was the same which was put up by the defendant, and sold by him to Aspinwall, and by Aspinwall to Foord. That, if they should find the defendant liable, the plaintiffs in this action were entitled to recover damages only for the personal injury and suffering of the wife, and not for loss of service, medical treatment, or expense to the husband, and that the recovery should be confined to the actual damages suffered by the wife. The action was properly brought in the name of the husband and wife for the personal injury and suffering of the wife, and the case was left to the jury with the proper directions on that point. 1 Chit. Pl. (Ed. of 1828) 62.

The case depends on the first point taken by the defendant on his motion for a nonsuit; and the question is whether, the defendant being a remote vendor of the medicine, and there being no privity or connection between him and the plaintiffs, the action can be maintained. If, in labeling a poisonous drug with the name of a harmless medicine, for public market, no duty was violated by the defendant, excepting that which he owed to Aspinwall, his immediate vendee, in virtue of his contract of sale, this action cannot be maintained. If A build a wagon, and sell it to B, who sells it to C, and C hires it to D, who, in consequence of the gross negligence of A in building the wagon, is overturned and injured, D cannot recover damages against A, the builder. A's obligation to build the wagon faithfully arises solely out of his contract with B. The public have nothing to do with it. Misfortune to third persons, not parties to the contract, would not be a natural and necessary consequence of the builder's negligence; and such negligence is not an act imminently dangerous to human life. So, for the same reason, if a horse be defectively shod by a smith, and a person hiring the horse from the owner is thrown and injured in consequence of the smith's negligence in shoeing, the smith is not liable for the injury. The smith's duty in such case grows exclusively out of his contract with the owner of the horse. It was a duty which the smith owed to him alone, and to no one else. And, although the

injury to the rider may have happened in consequence of the negligence of the smith, the latter was not bound, either by his contract or by any considerations of public policy or safety, to respond for his breach of duty to any one except the person he contracted with. This was the ground on which the case of *Winterbottom v. Wright*, 10 Mees. & W. 109, was decided. A contracted with the postmaster general to provide a coach to convey the mail-bags along a certain line of road, and B and others also contracted to horse the coach along the same line. B and his co-contractors hired C, who was the plaintiff, to drive the coach. The coach, in consequence of some latent defect, broke down. The plaintiff was thrown from his seat, and lamed. It was held that C could not maintain an action against A for the injury thus sustained. The reason of the decision is best stated by Baron Rolfe: A's duty to keep the coach in good condition was a duty to the postmaster general, with whom he made his contract, and not a duty to the driver employed by the owners of the horses.

But the case in hand stands on a different ground. The defendant was a dealer in poisonous drugs. Gilbert was his agent in preparing them for market. The death or great bodily harm of some person was the natural and inevitable consequence of the sale of belladonna by means of the false label. Gilbert, the defendant's agent, would have been punishable for manslaughter if Mrs. Thomas had died in consequence of taking the falsely labeled medicine. Every man who, by his culpable negligence, causes the death of another, although without intent to kill, is guilty of manslaughter. 2 Rev. St. p. 662, § 19. A chemist who negligently sells laudanum in a phial labeled as paregoric, and thereby causes the death of a person to whom it was administered, is guilty of manslaughter. *Tessymond's Case*, 1 Lewin, Cr. Cas. 169. "So highly does the law value human life that it admits of no justification wherever life has been lost, and the carelessness or negligence of one person has contributed to the death of another." *Regina v. Swindall*, 2 Car. & K. 232, 233. And this rule applies, not only where the death of one is occasioned by the negligent act of another, but where it is caused by the negligent omission of a duty of that other. *Regina v. Haines*, Id. 368, 371. Although the defendant, Winchester, may not be answerable criminally for the negligence of his agent, there can be no doubt of his liability in a civil action, in which the act of the agent is to be regarded as the act of the principal.

In respect to the wrongful and criminal character of the negligence complained of, the case differs widely from those put by the defendant's counsel. No such imminent danger existed in those cases. In the present case the sale of the poisonous article was made to a dealer in drugs, and not to a consumer. The injury, therefore, was

not likely to fall on him, or on his vendee, who was also a dealer; but much more likely to be visited on a remote purchaser, as actually happened. The defendant's negligence put human life in imminent danger. Can it be said that there was no duty on the part of the defendant to avoid the creation of that danger by the exercise of greater caution, or that the exercise of that caution was a duty only to his immediate vendee, whose life was not endangered? The defendant's duty arose out of the nature of his business and the danger to others incident to its mismanagement. Nothing but mischief like that which actually happened could have been expected from sending the poison falsely labeled into the market, and the defendant is justly responsible for the probable consequences of the act. The duty of exercising caution in this respect did not arise out of the defendant's contract of sale to Aspinwall. The wrong done by the defendant was in putting the poison, mislabeled, into the hands of Aspinwall, as an article of merchandise, to be sold and afterwards used as the extract of dandelion, by some person then unknown. The owner of a horse and cart who leaves them unattended in the street is liable for any damage which may result from his negligence. *Lynch v. Nurdin*, 1 Adol. & E. (N. S.) 29; *Illidge v. Goodwin*, 5 Car. & P. 190. The owner of a loaded gun who puts it into the hands of a child, by whose indiscretion it is discharged, is liable for the damage occasioned by the discharge. *Dixon v. Bell*, 5 Maule & S. 198.

The defendant's contract of sale to Aspinwall does not excuse the wrong done to the plaintiffs. It was a part of the means by which the wrong was effected. The plaintiffs' injury and their remedy would have stood on the same principle if the defendant had given the belladonna to Dr. Foord without price, or if he had put it in his shop without his knowledge, under circumstances which would probably have led to its sale on the faith of the label. In *Longmeid v. Holliday*, 6 Law & Eq. Rep. 562, the distinction is recognized between an act of negligence imminently dangerous to the lives of others, and one that is not so. In the former case, the party guilty of the negligence is liable to the party injured, whether there be a contract between them or not; in the latter, the negligent party is liable only to the party with whom he contracted, and on the ground that negligence is a breach of the contract.

The defendant on the trial insisted that Aspinwall and Foord were guilty of negligence in selling the article in question for what it was represented to be in the label, and that the suit, if it could be sustained at all, should have been brought against Foord. The judge charged the jury that if they, or either of them, were guilty of negligence in selling the belladonna for dandelion, the verdict must be for the defendant, and left the question of their negligence to the jury, who found on that point for the plaintiffs. If the case really

depended on the point thus raised, the question was properly left to the jury. But I think it did not. The defendant, by affixing the label to the jar, represented its contents to be dandelion, and to have been "prepared" by his agent, Gilbert. The word "prepared" on the label must be understood to mean that the article was manufactured by him, or that it had passed through some process under his hands, which would give him personal knowledge of its true name and quality. Whether Foord was justified in selling the article upon the faith of the defendant's label would have been an open question in an action by the plaintiffs against him, and I wish to be understood as giving no opinion on that point. But it seems to me to be clear that the defendant cannot, in this case, set up as a defense that Foord sold the contents of the jar as and for what the defendant represented it to be. The label conveyed the idea distinctly to Foord that the contents of the jar was the extract of dandelion, and that the defendant knew it to be such. So far as the defendant is concerned, Foord was under no obligation to test the truth of the representation. The charge of the judge in submitting to the jury the question in relation to the negligence of Foord and Aspinwall cannot be complained of by the defendant.

GARDINER, J., concurred in affirming the judgment, on the ground that selling the belladonna, without a label indicating that it was a poison, was declared a misdemeanor by statute (2 Rev. St. p. 694, § 25), but expressed no opinion upon the question whether, independent of the statute, the defendant would have been liable to these plaintiffs.

GRIDLEY, J., was not present when the cause was decided. All the other members of the court concurred in the opinion delivered by RUGGLES, C. J.

Judgment affirmed.

(This case was followed in *Devlin v. Smith*, 89 N. Y. 470, 42 Am. Rep. 311, which states the rule as follows: "The liability of a builder or manufacturer is, in general, only to the person with whom he contracted. But, notwithstanding this rule, liability to third parties has been held to exist when the defect is such as to render the article imminently dangerous, and serious injury to any person using it is a natural and probable consequence of its use." To the same effect are *Huset v. Case Machine Co.*, 120 Fed. 865, 57 C. C. A. 237, 61 L. R. A. 303, citing many cases; *Norton v. Sewall*, 106 Mass. 143, 8 Am. Rep. 298; *Bishop v. Weber*, 139 Mass. 411, 1 N. E. 154, 52 Am. Rep. 715; *Van Winkle v. Amer. Steam Boiler Co.*, 52 N. J. Law, 240, 19 Atl. 472; *State v. Fox*, 79 Md. 514, 29 Atl. 601, 24 L. R. A. 679, 47 Am. St. Rep. 424; *Schubert v. Clark Co.*, 49 Minn. 331, 51 N. W. 1103, 15 L. R. A. 818, 32 Am. St. Rep. 559; *Peters v. Johnson*, 50 W. Va. 644, 41 S. E. 190, 57 L. R. A. 428, 88 Am. St. Rep. 909; *Davis v. Guarnieri*, 45 Ohio St. 470, 15 N. E. 350, 4 Am. St. Rep. 548; *Bright v. Barnett Co.*, 88 Wis. 299, 60 N. W. 418, 26 L. R. A. 524; *Lewis v. Terry*, 111 Cal. 39, 43 Pac. 398, 31 L. R. A. 220, 52 Am. St. Rep. 146; *Ives v.*

Welden, 114 Iowa, 476, 87 N. W. 408, 54 L. R. A. 854, 89 Am. St. Rep. 379; cf. Heaven v. Pender, 11 Q. B. D. 503; Parry v. Smith, L. R. 4 C. P. D. 325; Bickford v. Richards, 154 Mass. 163, 27 N. E. 1014, 26 Am. St. Rep. 224.)

## Liability of infants for torts.

(17 Wis. 230.)

### HUCHTING v. ENGEL

(Supreme Court of Wisconsin. June Term, 1863.)

#### TRESPASS—LIABILITY OF INFANT.

An infant, though only a little over six years old, is liable for a trespass committed by him in breaking and entering the premises of another, and breaking down and destroying shrubbery and flowers, but only compensatory damages are recoverable.

#### Error to Circuit Court, Dane County.

Huchting brought an action before a justice of the peace against Moirtz Engel for breaking and entering the plaintiff's premises, and breaking down and destroying his shrubbery and flowers therein standing and growing. The answer, after a general denial, stated that, if the defendant ever committed the alleged trespass, "he did so through the want of judgment and discretion, being an infant of about six years of age." On the trial before the justice the plaintiff proved the alleged trespass and damages; and on the part of the defense it was shown that the defendant, at the time of the trespass, was but little more than six years old. A motion to dismiss the action, on the ground that the defendant was "of such tender years that a suit at law could not be maintained against him, nor execution issued on a judgment against him," was overruled. The justice rendered judgment against the defendant for \$3.00 damages, with costs. The circuit court, on appeal, reversed the judgment, and the plaintiff sued out his writ of error.

DIXON, C. J. "Infants are liable in actions arising ex delicto, whether founded on positive wrongs, as trespass or assault, or constructive torts or frauds." 2 Kent's Com. 241.

"Where the minor has committed a tort with force, he is liable at any age, for in case of civil injuries with force the intention is not regarded; for in such a case a lunatic is as liable to compensate in damages as a man in his right mind." Reeve's Dom. Rel. 258.

"The privilege of infancy is purely protective, and infants are liable to actions for wrong done by them; as to an action for slander, an action of trover for property embezzled, or an action grounded on fraud committed." Macpherson on Infants, 481 (41 Law Lib. 305).

"Infants are liable for torts and injuries of a private nature; as disseisins, trespass, slander, assault, etc." Bingham on Infancy, 110.

"All the cases agree that trespass lies against an infant." *Hartfield v. Roper*, 21 Wend. 620, 34 Am. Dec. 273.

This is the language of a few of the many writers and courts who have spoken upon the subject. All agree, and all are supported by the authorities, with no single adjudged case to the contrary. *Jennings vs. Randall*, 8 Term, 335; *Sikes v. Johnson*, 16 Mass. 389; *Homer v. Thwing*, 3 Pick. 492; *Campbell v. Stakes*, 2 Wend. 137, 19 Am. Dec. 561; *Bullock v. Babcock*, 3 Wend. 391; *Neal v. Gillett*, 23 Conn. 437; *Humphrey v. Douglass*, 10 Vt. 71, 33 Am. Dec. 177. In the latter case the minor was held answerable for a trespass committed by him, although he acted by command of his father.

The authorities cited by the counsel for the defendant in error have no bearing upon the question. They relate to the criminal responsibility of infants, to the question of negligence on their part, as whether it can be imputed to them so as to defeat actions brought by them to recover damages for personal injuries sustained in part in consequence of the negligence or unskillfulness of others; and to the liability of parents and guardians for wrongs committed by infants under their charge by reason of the neglect or want of proper care of such parents or guardians. The case at bar is none of these. The defendant is not prosecuted criminally; the action is not by him to recover damages for personal injury occasioned by the joint negligence of himself or his parents and another; nor is the liability of the parents involved. The suit is brought to recover damages for a trespass committed by him, not vindictive or punitive damages, but compensation, and for that he is clearly liable. If damages by way of punishment were demanded, undoubtedly his extreme youth and consequent want of discretion would be a good answer.

Judgment of the circuit reversed, and that of the justice of the peace affirmed.

(To the same effect are *Peterson v. Haffner*, 59 Ind. 130, 26 Am. Rep. 81 [action for assault and battery committed by boy 13 years old]; *Conklin v. Thompson*, 29 Barb. 218 [boy of 14 threw lighted firecracker under horse, and it exploded, causing the horse's death from fright]; *Neal v. Gillett*, 23 Conn. 437 [negligence by boys of 13 and 16]; *Eaton v. Hill*, 50 N. H. 235, 9 Am. Rep. 189 [infant bailee of a horse willfully injuring the animal so that it dies]; *Lewis v. Littlefield*, 15 Me. 233 [conversion by infant]; *Walker v. Davis*, 1 Gray, 506 [conversion]; *McCabe v. O'Connor*, 4 App. Div. 354, 38 N. Y. Supp. 572, affirmed 162 N. Y. 600, 57 N. E. 1116 [injury by fall upon plaintiff's adjacent premises of dangerous wall standing upon infant's land]).

(1 Hun, 578.)

## MOORE v. EASTMAN.

(Supreme Court of New York, General Term, Fourth Department. June Term, 1874.)

## INFANT—TORT CONNECTED WITH CONTRACT.

To render an infant, who has hired a horse to drive, liable in an action of tort for injury to the animal, he must do some willful and positive act which amounts to an election on his part to disaffirm the contract; a bare neglect to protect the animal from injury and to return it at the time agreed upon is not sufficient. If he willfully and intentionally injure the animal, an action will lie against him for the tort, but not if the injury complained of occur in the act of driving the animal, through his unskillfulness, and want of knowledge, discretion, and judgment.

Appeal from a judgment in favor of the defendant, entered upon the verdict of a jury.

This action was brought to recover against the defendant in trespass for an injury to a horse of the plaintiff. The answer denies the complaint, and sets up a contract of bailment and infancy. Evidence was given on the part of the plaintiff to show that he let the horse to the defendant for two days; that the horse was taken sick on the journey, and that such sickness was occasioned by overdriving; that the defendant, against the advice of the doctor and hotel keeper, drove the horse, while so sick, at a fast gait; and that shortly after the horse reached the plaintiff's stable he died from the effects of such overdriving.

GILBERT, J. The complaint avers a wrongful taking of the horse by the defendant, and that in consequence of his malicious, wicked, and cruel treatment the horse died. The defense is infancy, and that at the time the alleged wrongful acts were committed the horse was in the possession of the defendant, by virtue of a contract of bailment for hire, and that said wrongful acts occurred solely through the unskillfulness and want of judgment of the defendant, and not from any intentional or malicious or willful act or wrong on his part. The question is, what proof is requisite to a recovery upon such an issue? Acts, however aggravated, which merely establish a breach of the contract on the part of an infant, manifestly are insufficient. The plaintiff cannot convert anything that arises out of a contract with an infant into a tort, and then seek to enforce the contract through the medium of an action *ex delicto*. There must be a tort, independent of the contract. The authorities all agree on this principle. In *Jennings v. Rundall*, 8 T. R. 335, it was held that when a boy hired a horse, and injured it by immoderate driving, this was only a breach of contract, for which he was not liable. So, in *Green v. Greenbank*, 2 Marsh. 485, the court of com-

mon pleas, in England, held that an infant was not liable to an action for falsely and fraudulently deceiving the plaintiff in an exchange of horses, because the deceit was practiced in the course of the contract. The principle of these cases was unanimously approved by the late court for the correction of errors, in *Campbell v. Stakes*, 2 Wend. 137, 19 Am. Dec. 561, which was an action of trespass for misusing a mare hired by the defendant, who was an infant. It was held in that case that a bare neglect to protect the animal from injury, and to return it at the time agreed upon, would not subject an infant to an action of trespass, but that the infant must do some willful and positive act, which amounts to an election on his part to disaffirm the contract; that if the infant willfully and intentionally injured the animal, an action of trespass would lie against him for the tort; but that if the injury complained of occurred in the act of driving the animal, through the unskillfulness and want of knowledge, discretion, and judgment of the infant, he would not be liable. The rule thus established has not been changed in this state, to my knowledge, but, on the contrary, has been repeatedly recognized and approved. *The People v. Kendall*, 25 Wend. 399, 37 Am. Dec. 240; *Munger v. Hess*, 28 Barb. 75; *Robbins v. Mount*, 4 Rob. 553. What, then, is the willful and positive act which amounts to an election to disaffirm the contract? Certainly, such an act cannot be predicated of a use of the animal in the course of the bailment, however excessive, unless the excess was such as to indicate that it was resorted to for a purpose beyond that for which the horse was hired. Nothing of that kind appears in this case. Instances of the kind of wrong that will make an infant liable are not wanting in the adjudged cases. *Burnard v. Haggis*, 14 C. B. (N. S.) 45, where an infant hired a mare on the terms that it was to be ridden on the road, and not over fences in the fields, and the infant lent it to a friend, who took it off the highroad, and, in endeavoring to jump the animal over a fence, transfixed it on a stake and killed it; *Towne v. Wiley*, 23 Vt. 355, 56 Am. Dec. 85, *Homer v. Thwing*, 3 Pick. 492, *Lucas v. Trumbull*, 15 Gray, 307, and *Fish v. Ferris*, 5 Duer, 49, where the infant drove the horse further than the stipulated journey, or on a different one; and cases where an infant obtains goods by fraud, and then refuses to deliver them up on the demand of the party who has been defrauded, or where he has been intrusted with them for a special purpose, and has perverted them to another purpose—may be taken as examples. They are all consistent with, and at least furnish a negative confirmation of, the principle before alluded to, that a mere violation of a contract, though attended with tortious results, will not make the infant liable, but that to have that effect the act must be wholly tortious.

In the case before us, taking the evidence on the part of the plaintiff alone, the defendant is fairly chargeable with only two or three

acts of immoderate driving of the horse while performing the service for which he was hired, and with driving him when not in a fit condition to continue that service. There was no other basis for the inference that the injury to the horse was positive or willful.

The question whether the injury was of that character, or was the result of indiscretion, or want of skill and judgment on the part of the defendant, was fairly submitted to the jury, and we think their verdict was correct.

Several requests were made to the judge to modify his charge. One of them was that if the jury should find the horse was overdriven, and in a cruel and unusual manner, they might infer the intent from such cruel driving. This was properly refused, because there was no evidence of such cruelty. The other requests, though variant in form, presented merely the converse of the propositions embraced in the judge's charge, and, of course, were properly refused. The judgment must be affirmed.

Judgment affirmed.

(To the same effect is *Young v. Muhling*, 48 App. Div. 617, 63 N. Y. Supp. 181.)

(175 Mass. 513, 56 N. E. 574, 49 L. R. A. 560, 78 Am. St. Rep. 510.)

### SLAYTON v. BARRY.

(Supreme Judicial Court of Massachusetts. Middlesex. March 3, 1900.)

**INFANT—TORT CONNECTED WITH CONTRACT—FALSE STATEMENT AS TO AGE.**

Where an infant, by falsely representing himself to be of full age, induces another to sell him goods, he is not liable in an action of tort for so obtaining the goods any more than he would be in an action on contract.

Exceptions from Superior Court, Middlesex County; Caleb Blodgett, Judge.

Action by John C. F. Slayton against Philip A. Barry. From a ruling ordering a verdict for defendant, plaintiff excepts. Exceptions overruled.

**MORTON, J.** The declaration in this case is in two counts. The second count is in trover for the goods described in the first count. The first count alleges, in substance, that the defendant, intending to defraud the plaintiff, deceitfully and fraudulently represented to him that he was of full age, and thereby induced the plaintiff to sell and deliver to him the goods described, and, though often requested, had refused to pay for or return the goods, but had delivered them to persons unknown to the plaintiff. The case is here on exceptions to the refusal of the presiding judge to give certain instructions requested by the plaintiff, and to his ruling ordering a verdict for the

defendant. The question is whether the plaintiff can maintain his action. He could not bring an action of contract, and so has brought an action of tort. The precise question presented has never been passed upon by this court. *Merriam v. Cunningham*, 11 Cush. 40, 43. In other jurisdictions it has been decided differently by different courts. We think that the weight of authority is against the right to maintain the action. *Johnson v. Pie*, 1 Lev. 169, 1 Sid. 258, 1 Keb. 905; *Grove v. Nevill*, 1 Keb. 778; *Jennings v. Rundall*, 8 Term R. 335; *Green v. Greenbank*, 2 Marsh. 485; *Price v. Hewett*, 8 Exch. 146; *Wright v. Leonard*, 11 C. B. (N. S.) 258; *De Roo v. Foster*, 12 C. B. (N. S.) 272; *Gilson v. Spear*, 38 Vt. 311, 88 Am. Dec. 659; *Nash v. Jewett*, 61 Vt. 501, 18 Atl. 47, 4 L. R. A. 561, 15 Am. St. Rep. 931; *Ferguson v. Bobo*, 54 Miss. 121; *Brown v. Dunham*, 1 Root, 272; *Geer v. Hovey*, Id. 179; *Wilt v. Welsh*, 6 Watts, 9; *Burns v. Hill*, 19 Ga. 22; *Kilgore v. Jordan*, 17 Tex. 341; *Benj. Sales* (6th Ed.) 23; *Cooley, Torts* (2d Ed.) 126; 2 *Add. Torts*, § 1314. See, contra, *Fitts v. Hall*, 9 N. H. 441; *Eaton v. Hill*, 50 N. H. 235, 9 Am. Rep. 189; *Hall v. Butterfield*, 59 N. H. 354, 47 Am. Rep. 209; *Rice v. Boyer*, 108 Ind. 472, 9 N. E. 420, 58 Am. Rep. 53; *Wallace v. Morss*, 5 Hill, 391.

The general rule is, of course, that infants are liable for their torts. *Sikes v. Johnson*, 16 Mass. 389; *Homer v. Thwing*, 3 Pick. 492; *Shaw v. Coffin*, 58 Me. 254, 4 Am. Rep. 290; *Vasse v. Smith*, 6 Cranch, 226, 3 L. Ed. 207. But the rule is not an unlimited one. It is to be applied with due regard to the other equally well settled rule, that, with certain exceptions, they are not liable on their contracts; and the dominant consideration is not that of liability for their torts, but of protection from their contracts. The true rule seems to us to be as stated in *Association v. Fairhurst*, 9 Exch. 422, 429, where it was sought to hold a married woman for a fraudulent misrepresentation, namely: If the fraud "is directly connected with the contract, \* \* \* and is the means of effecting it, and parcel of the same transaction," then the infant will not be liable in tort. The rule is stated in 2 *Kent, Comm.* (8th Ed.) § 241, as follows: "The fraudulent act, to charge him [the infant], must be wholly tortious; and a matter arising ex contractu, though injected with fraud, cannot be changed into a tort in order to charge the infant in trover or case by a change in the form of the action." In the present case it seems to us that the fraud on which the plaintiff relies was part and parcel of the contract, and directly connected with it. The plaintiff cannot maintain his action without showing that there was a contract, which he was induced to enter into by the defendant's fraudulent representations in regard to his capacity to contract, and that pursuant to that contract there was a sale and delivery of the goods in question. Whether, as an original proposition, it would be better if the rule were as laid down in *Fitts v. Hall*, supra, and

*Hall v. Butterfield*, supra, in New Hampshire, and *Rice v. Boyer*, supra, in Indiana, we need not consider. The plaintiff relies on *Homer v. Thwing*, supra; *Badger v. Phinney*, 15 Mass. 359, 8 Am. Dec. 105, and *Walker v. Davis*, 1 Gray, 506. In *Walker v. Davis*, supra, there was no completed contract, and the title did not pass. The sale of the cow by the defendant operated, therefore, clearly, as a conversion. *Badger v. Phinney*, supra, was an action of replevin; and it was held that the property had not passed, or if it had, that it had reverted in the plaintiff in consequence of the defendant's fraud. The plaintiff maintained his action independently of the contract. In *Homer v. Thwing*, supra, the tort was only incidentally connected with the contract of hiring. We think that the exceptions should be overruled. So ordered.

(See *Hewitt v. Warren*, 10 Hun, 560; *N. Y. Bldg. Loan Banking Co. v. Fisher*, 23 App. Div. 363, 48 N. Y. Supp. 152. As to the liability of married women for fraud connected with contract, see *Cooley on Torts* [2d Ed.] 133, 134; for their torts generally, *Id.* 131, 132, 135. The common-law rules in regard to married women have been much changed by modern statutes, making them liable for their torts pretty much as single women are.)

### Co-tort-feasors; how sued.

(90 Hun, 588, 35 N. Y. Supp. 975.)

**KIRBY v. PRESIDENT, ETC., OF DELAWARE & H. CANAL CO. et al.**

(Supreme Court of New York, General Term, Third Department. December 3, 1895.)

#### JOINT WRONGDOERS—HOW SUED.

In an action for negligence, the liability being joint and several, plaintiff may proceed against any one, all, or such number of wrongdoers as he may choose, and where two or more are sued together, the jury may find in favor of one defendant and against the others.

Appeal from Circuit Court, Rensselaer County.

Action by Sarah Kirby against the president, managers, and company of the Delaware & Hudson Canal Company and Dell Brown for personal injuries received in consequence of the explosion of a hot-water heating apparatus in an hotel of which defendant Brown was owner and proprietor, and in which defendant railroad company, by permission of defendant Brown, had a ticket office; plaintiff being at the time of the accident in the sitting room of the hotel, which was from time to time used by ladies waiting for trains; she having gone there after taking a meal at the hotel, to wait for defendant's train, on which she was to proceed on her trip. From a judgment for plaintiff, and an order denying a new trial, defendants appeal. Reversed.

Argued before MAYHAM, P. J., and PUTNAM and HERRICK, JJ.

HERRICK, J. The action against the defendant is one founded upon alleged negligence. In such cases the plaintiff may proceed against any one, all, or such number of the wrongdoers as he may choose. *Roberts v. Johnson*, 58 N. Y. 613. The liability is a joint and several liability. *Kain v. Smith*, 80 N. Y. 458-468. In action of tort, where two or more are sued together, a jury may find in favor of one defendant and against the other. *Lansing v. Montgomery*, 2 Johns. 382; *Drake v. Barrymore*, 14 Johns. 166; *Lockwood v. Bull*, 1 Cow. 322, 13 Am. Dec. 539; *Beal v. Finch*, 11 N. Y. 128-134. In this case the legal relations between the plaintiff and the defendant Brown, and between the plaintiff and the defendant railroad company, were different; and it seems to me, therefore, that this is peculiarly a case where the above-cited rules are applicable, and where it might well be held that the jury had the power, if they thought the evidence justified them, in holding one defendant responsible and the other not. Upon the trial, in charging the jury, the court said, "I think they cannot find against one and in favor of the other, under the testimony in this case," to which exception was taken. That, I think, was error, sufficient to call for a reversal of the judgment. That being so, there is no occasion at this time to examine the other questions argued upon this appeal.

The judgment and order appealed from should be reversed, and a new trial granted; costs to abide the event. All concur.

(To the same effect are *Atlantic & P. R. Co. v. Laird*, 164 U. S. 393, 17 Sup. Ct. 120, 41 L. Ed. 485; *Gudger v. Western R. Co.* [C. C.] 21 Fed. 81; *Corey v. Havener*, 182 Mass. 250, 65 N. E. 69; *Dyett v. Hyman*, 129 N. Y. 351, 29 N. E. 261, 26 Am. St. Rep. 533; *Wabash, St. L. & P. R. Co. v. Shacklet*, 105 Ill. 364, 44 Am. Rep. 791. The same rule applies to *partners* as regards torts committed in the course of the partnership business. *Wisconsin Cent. R. Co. v. Ross*, 142 Ill. 9, 31 N. E. 412, 34 Am. St. Rep. 49; *Roberts v. Johnson*, 58 N. Y. 613; *Howe v. Shaw*, 56 Me. 291. Partners are liable for the torts of one of them, though done without the knowledge of the others, if done for the benefit of the partnership and within the scope of its business. *Lothrop v. Adams*, 133 Mass. 471, 481, 43 Am. Rep. 528; *Strang v. Bradner*, 114 U. S. 555, 5 Sup. Ct. 1038, 29 L. Ed. 248; *Chester v. Dickerson*, 54 N. Y. 1, 13 Am. Rep. 550.

An analogous rule is thus stated: "While it is true that persons who act separately and independently, each causing a separate and distinct injury, cannot be sued jointly, even though the injuries may have been precisely similar in character and inflicted at the same moment [see *Howard v. Union Traction Co.*, 195 Pa. 391, 45 Atl. 1076], yet if such persons, acting independently, by their several acts directly contribute to produce a single injury, each being sufficient to have caused the whole, and it is impossible to distinguish the portions of injury caused by each, they are then joint tort-feasors, and may be sued either jointly or severally, at the election of the plaintiff, and in such an action against one or more the whole damage may be recovered." *Allison v. Hobbs*, 96 Me. 26, 51 Atl. 245; *Boston & A. R. Co. v. Shanly*, 107 Mass. 568; *Newman v. Fowler*, 37 N. J. Law, 89; *Economy Light Co. v. Hiller*, 203 Ill.

518, 68 N. E. 72; *Slater v. Mersereau*, 64 N. Y. 138; cf. *Chipman v. Palmer*, 77 N. Y. 51, 33 Am. Rep. 566. But where the dogs of different persons do damage together, each owner is only liable for the mischief done by his own dog. *Nierenberg v. Wood*, 59 N. J. Law, 112, 35 Atl. 654; *Auchmuty v. Ham*, 1 Denio, 495.

It is the generally accepted rule that a judgment against one of two or more co-tort-feasors will not bar an action against another of them, or against the others, but that *judgment plus satisfaction* will operate as a bar. *Knapp v. Roche*, 94 N. Y. 329; *Luce v. Dexter*, 135 Mass. 23; *Maple v. Railroad Co.*, 40 Ohio St. 313, 48 Am. Rep. 685; *City of Roodhouse v. Christian*, 158 Ill. 137, 41 N. E. 748; *Westbrook v. Mize*, 35 Kan. 299, 10 Pac. 881. If several actions are brought, the plaintiff may recover costs in all the actions. *Lord v. Tiffany*, 98 N. Y. 412, 50 Am. Rep. 689.)

### The same: damages not apportioned among the co-tort-feasors.

(14 R. I. 175.)

KEEGAN v. HAYDEN et al.

(Supreme Court of Rhode Island. May 31, 1883.)

#### JOINT TRESPASSERS—APPORTIONMENT OF DAMAGES.

On a verdict for plaintiff, in an action for assault and battery and false imprisonment against several defendants, the damages are properly assessed jointly against all, without discrimination between the defendants.

#### Petition for a new trial.

Action of trespass by Lawrence Keegan against William F. Hayden and others. The jury found a verdict against all the defendants. Defendants petitioned for a new trial.

DURFEE, C. J. This is a petition for the new trial of an action of trespass against three several defendants for assault and battery and false imprisonment. The defendants pleaded jointly—First, the general issue; and, second, a special plea in justification that they were police constables of the city of Providence, and as such arrested the plaintiff for intoxication in the public streets of said city, and detained him for trial, the said arrest and detention being the trespasses complained of. The jury on trial returned a verdict for the plaintiff against them all jointly for \$500. One of the grounds assigned for new trial is that the jury did not discriminate between the defendants, but assessed them all jointly for the full amount of the damages. We do not find any error in this. The rule is that, in an action of tort against several who are jointly charged, the verdict ought to be rendered against all who are proved guilty as charged, without any apportionment of the damages, each and all of them being alike liable for the wrong to the fullest extent, in whatever different degrees they

may have contributed to it. *Hill v. Goodchild*, 5 Burrows, 2790; *Hume v. Oldacre*, 1 Starkie, 351; *Berry v. Fletcher*, 1 Dill. 67, 71, Fed. Cas. No. 1,357; *Sprague v. Kneeland*, 12 Wend. 161; *Halsey v. Woodruff*, 9 Pick. 555; *Fuller v. Chamberlain*, 11 Metc. (Mass.) 503; *Currier v. Swan*, 63 Me. 323; *Clark v. Bales*, 15 Ark. 452; *Hair v. Little*, 28 Ala. 236; *Bell v. Morrison*, 27 Miss. 68; *Beal v. Finch*, 11 N. Y. 128.

The defendants also ask for a new trial because the verdict is against the evidence, and the weight thereof, and because the damages are excessive. The evidence is conflicting, but we are not prepared to set the verdict aside for the first of these two reasons. We think, however, that the damages are excessive, for, according to the evidence, the peace of the street had been disturbed, and the plaintiff, if not indecently drunk, had been drinking enough to make him excitable and abusive. A new trial will therefore be granted, unless the verdict is reduced to \$300.

(Additional authorities are *Post v. Stockwell*, 34 Hun, 373; *Huddleston v. West Bellevue*, 111 Pa. 110, 2 Atl. 200; *Everroad v. Gabbert*, 83 Ind. 489.)

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**The same: in general, no right of contribution exists between co-tort-feasors; exceptions.**

(28 Conn. 455.)

**BAILEY v. BUSSING** (In part).

(Supreme Court of Errors of Connecticut. October Term, 1859.)

**1. CONTRIBUTION—TORTS.**

The rule that there can be no contribution among wrong-doers applies properly only to cases where there has been an intentional violation of law, or where the wrong-doer is to be presumed to have known that the act was unlawful.

**2. SAME.**

A judgment was recovered in tort against three defendants, jointly interested in the running of a stage, for an injury caused to a traveler upon the road by the negligence of one of the defendants, who was driving. One of the other defendants was compelled to pay the whole amount of the judgment, and brought an action against the defendant whose negligence had caused the injury for a contribution. *Held*, that he was clearly entitled to a contribution, if not to a full indemnity.

Action by George F. Bailey and another in assumpsit, as executors of Aaron Turner, against Thomas Bussing to recover one-third of the amount of a judgment recovered against Turner and the defendant and one Whitlock for an injury by the negligent management of a public stage on the highway, in the running of which all the defend-

ants were alleged to be jointly interested. The defendant Bussing was the driver of the stage, and the injury was caused by his negligence. Judgment for plaintiffs. Defendant moves for a new trial. Denied.

ELLSWORTH, J. This is an action of assumpsit, to compel a contribution for money paid on a judgment against three defendants, Whitlock, Aaron Turner the plaintiffs' testator, and Bussing the present defendant. That there was a judgment rendered by the superior court for Fairfield county at its February term in 1852, against Whitlock, Turner and Bussing, and that Turner was compelled to pay, and did pay, on the execution, the whole amount of the judgment, or such a sum as was received in satisfaction of the judgment, is admitted or not denied. This evidence, it is said, would in law *prima facie* entitle the plaintiffs to recover one-third of the sum paid from the defendant, and that there must be such recovery unless there is something peculiar to the present case which saves it from the application of the principle ordinarily applicable to such cases.

If this judgment had been recovered on a joint contract or joint liability of any kind sounding in contract, the production of the judgment, and proof of payment by Turner of the whole sum, would of course show a good cause of action in the plaintiffs for the recovery from Bussing of one-third the amount paid. Is there anything on this record which, when taken in connection with the evidence received in the case, distinguishes this case from the one just supposed?

The defendant insists that that judgment was rendered in an action of tort, and that in that class of cases there is to be no contribution among wrong-doers; the maxim of law being, as he claims, that among tort-feasors there is no contribution. To meet this objection, the plaintiffs offered evidence, and we think with entire propriety, to prove that, while the maxim might be true as a general rule, the case on trial belonged to a class of cases to which it had no application, for that here there was no personal wrong, not even negligence in a culpable sense, on the part of Turner, and that he had been found guilty only by implication, or legal inference from a supposed relation to Bussing, the actual wrong-doer, through whose neglect the other two defendants had been subjected by the jury.

No objection was made to the reception of the evidence, and we think none could properly have been made. The court received it and found the fact to be as claimed by the plaintiffs, that Turner was not present, and had no participation in the negligent conduct of the driver of the stage which caused the injury to Mrs. Haight, notwithstanding that, under the particular charge of the court in that case, the jury found that Turner was, in a legal sense, implicated and liable, even though there was not any actual wrong on his part.

What then is this case? And what is the true doctrine of the law

as to contribution, or, as it may be, full indemnity, where there has been no illegal act or conduct on the part of him who seeks for a contribution?

The reason assigned in the books for denying contribution among trespassers is that no right of action can be based on a violation of law, that is, where the act is known to be such or is apparently of that character. A guilty trespasser it is said can not be allowed to appeal to the law for an indemnity, for he has placed himself without its pale by contemning it, and must ask in vain for its interposition in his behalf. If however he was innocent of an illegal purpose, ignorant of the nature of the act, which was apparently correct and proper, the rule will change with its reason, and he may then have an indemnity, or as the case may be a contribution, as a servant yielding obedience to the command of his master, or an agent to his principal, in what appears to be right, an assistant rendering aid to a sheriff in the execution of process, or common carriers, to whom is committed and who innocently carry away property which has been stolen from the owner. Indemnity, or contribution to the full amount, is allowable here, and it can be enforced by action if refused, whether the person seeking it has been subjected in case or assumpsit to the damages of which he complains. And since in many instances the person injured has an election to sue in case or assumpsit, it is not possible that the form of action in which the party seeking for indemnity or contribution has been subjected, should be the criterion of his right to call for it. One partner or one joint proprietor may do that which will subject all the rest in case or assumpsit, as the fact may be, but there may be a right to contribution notwithstanding, and in some cases, if indeed the present is not one of them, a full indemnity may be justly demanded from the person doing the wrong, by the other partners whom he has involved in loss by his wrongful act. The form of action then is not the criterion. We must look further. We must look for personal participation, personal culpability, personal knowledge. If we do not find these circumstances, but perceive only a liability in the eye of the law, growing out of a mere relation to the perpetrator of the wrong, the maxim of law that there is no contribution among wrong doers is not to be applied. Indeed we think this maxim too much broken in upon at this day to be called with propriety a rule of law, so many are the exceptions to it, as in the cases of master and servant, principal and agent, partners, joint operators, carriers and the like.

One of the earliest cases where the maxim is recognized is *Merryweather v. Nixan*, 8 Term R. 186, where the plaintiff was the active wrong doer. Having paid the whole damage, he sought for a contribution. It was denied him, and rightfully so, upon the strength of the maxim referred to. But even here, lest a wrong inference should be drawn from the decision, Lord Kenyon, C. J., says: "This

decision will not affect cases of indemnity where one man employed another to do an act not unlawful in itself." The earlier case of *Philips v. Biggs*, Hardr. 164, in which this point was raised, was never decided. In *Wooley v. Batte*, before Justice Park, 2 Car. & P. 417, one stage proprietor had been sued alone in case for an injury to a passenger through the neglect of the coachman, and, having paid the damages, he brought assumpsit for a contribution, and recovered on the ground that in him there was no personal fault. In *Adamson v. Jarvis*, 4 Bing. 66, suit was brought for indemnity by an auctioneer against his employer, he having sold goods which did not belong to his employer and for which he had been compelled to pay upon a judgment recovered against him by the owner, being himself innocent. The court held that he could recover. Best, C. J., said: "From the inclination of the court in the case in *Hardres* and from the concluding part of Lord Kenyon's judgment in *Merryweather v. Nixan*, and from reason, justice and sound policy, the rule that wrong doers can not have redress or contribution against each other, is confined to cases where the person seeking redress must be presumed to have known that he was doing an unlawful act." In *Betts v. Gibbins*, 2 Adol. & E. 57, Lord Denman, C. J., says: "The general rule is, that between wrong doers there is neither indemnity nor contribution. The exception is where the act is not clearly illegal in itself. If they were acting bona fide, I can not conceive what rule there can be to hinder the defendant from being liable for the risk." Again, speaking of *Battersey's Case*, Winche, 48, he says that it shows that there may be an indemnity between wrong doers, unless it appears that they have been jointly concerned in doing what the party complaining knew to be illegal. In *Story on Partnership* (section 220) the learned commentator says, speaking of the maxim that there is no contribution among wrong doers, "but the rule is to be understood according to its true sense and meaning, which is where the tort is a known, meditated wrong, and not where the party is acting under the supposition of the innocence and propriety of the act, and the tort is one by construction or inference of law. In the latter case, although not in the former, there may be and properly is a contribution allowed by law for such payments and expenses between the constructive wrong doers, whether partners or not." The cases are all brought together in *Chitty on Contracts* (page 502), where the author most fully sustains by his own remarks the qualifications of the rule laid down by Lord Denman. I will here leave this topic, only repeating my remark that the maxim in question is scarcely worthy of being considered a general rule of law, for it is applicable only to a definite class of cases, and to that class the case before us does not belong.

We conclude therefore that the objections we have been considering ought not to defeat the right of the plaintiff to recover, and we

do not advise a new trial. In this opinion the other judges concurred.

New trial not advised.

(To the same effect are *Armstrong Co. v. Clarion Co.*, 66 Pa. 218, 5 Am. Rep. 368; *Nichols v. Nowling*, 82 Ind. 488; *Herr v. Barber*, 2 Mackey, 545; *Goldsborough v. Darst*, 9 Ill. App. 205; *Gregg v. Page Belting Co.*, 69 N. H. 247, 46 Atl. 26; *Vandiver v. Pollak*, 97 Ala. 467, 12 South. 473, 19 L. R. A. 628. In *Palmer v. Wick, etc., Shipping Co.* [1894] A. C. 318, it is said that the doctrine of *Merryweather v. Nixan*, 8 Term R. 186, ought not to be extended. In *Kolb v. National Surety Co.*, 176 N. Y. 233, 68 N. E. 247, it is said: "The general proposition is true that there is no right of contribution as between wrongdoers which can be enforced, for a court of equity will refuse to lend its aid to those who have been guilty of illegal conduct, or who do not come before it with clean hands.")

### The same: indemnity between tort-feasors.

(81 Hun, 147, 30 N. Y. Supp. 686.)

TRUSTEES OF VILLAGE OF CANANDAIGUA v. FOSTER (In part).

(Supreme Court of New York, General Term, Fifth Department. October 17, 1894.)

#### TORT-FEASORS—WHEN INDEMNITY RECOVERABLE.

Where a vault, covered by a grating in the sidewalk above, was constructed by the owner of abutting premises with the consent of the village, and he afterwards reconstructed it without such consent, but this work was done improperly, and, by reason thereof, the grating came soon afterwards to be in an unsafe condition, *held*, that the village might recover from him the amount which it was compelled to pay in an action against it by a person who was injured by the defective condition of the sidewalk.

Appeal from Circuit Court, Ontario County.

Action by the trustees of the village of Canandaigua against William L. Foster to recover the amount of a judgment recovered against and paid by said village in an action by one McSherry for personal injuries sustained by falling on a defective sidewalk in front of defendant's premises. From an order denying a motion for a new trial on the minutes of the court after verdict in favor of plaintiffs, defendant appeals. Affirmed.

Argued before DWIGHT, P. J., and LEWIS, HAIGHT, and BRADLEY, JJ.

DWIGHT, P. J. One McSherry, in 1889, brought an action against the village of Canandaigua for injuries sustained by him in falling on a defective sidewalk, in front of premises of defendant, on one of the streets of that village. The plaintiffs gave the defendant notice to defend the action, and he undertook to do so. Judgment,

however, went against the village, which the plaintiffs paid, and now bring their action over, to recover of the defendant the amount so paid. The defect in the sidewalk was a loose grating, covering the opening into a vault beneath. The vault was excavated and the grating set by the defendant many years before, with the acquiescence and consent, **actual or implied**, of the village authorities. *Babbage v. Powers*, 130 N. Y. 281, 29 N. E. 132, 14 L. R. A. 398. It was therefore out of the question that the plaintiffs should recover over, against the defendant, for the original construction, good or bad, of the vault and grating (*Trustees of Geneva v. Brush Electric Co.*, 50 Hun, 581, 3 N. Y. Supp. 595, affirmed 130 N. Y. 670, 29 N. E. 1034); and so the court held at the circuit. But the defendant reconstructed the opening and reset the grating in the summer of 1888, and the evidence on the part of the plaintiffs tends to show that this work was done in an improper manner, and that, in consequence of it, the grating soon after came to be in an unsafe condition, and that the accident to *McSherry* resulted therefrom. This evidence presented the main question which was submitted to the jury, and properly submitted, as we think. There was no evidence of consent on the part of the village to the reconstruction, nor lapse of time from which acquiescence should be inferred. If, therefore, the reconstructed opening and grating were a nuisance, the defendant, and not the village, was primarily liable for injuries to third persons resulting therefrom. As we had occasion to say in the case of *Village of Geneva*, *supra*: "The general rule which denies indemnity or contribution to joint wrongdoers is elementary. The cases in which recovery over is permitted in favor of one who has been compelled to respond to the party injured are exceptions to the general rule, and are based upon principles of equity. Such exceptions obtain in two classes of cases: First, where the party claiming indemnity has not been guilty of any fault except technically or constructively, as where an innocent master is held to respond for the tort of his servant, acting within the scope of his employment; or, second, where both parties have been in fault, but not in the same fault, towards the person injured, and the fault of the party from whom indemnity is claimed was the primary and efficient cause of the injury."

Illustrations of the second class were found in cases, like the present, "of recovery against municipalities for obstructions to the highways caused by private persons. The fault of the latter is the creation of the nuisance; that of the former, the failure to remove it, in the exercise of its duty to care for the safety of the public streets. The first was a positive tort, and the efficient cause of the injury complained of; the latter, the negative tort of neglect to act upon notice, express or implied." The cases here cited of *Village of Port Jervis v. First Nat. Bank*, 96 N. Y. 550, *Village of Seneca Falls v. Zalinski*, 8 Hun, 575, and *City of Rochester v. Montgomery*, 72 N. Y. 65, and

many others of like character, are cases of the second class above described; and they clearly support the submission of this case to the jury, with the instruction, in effect, that if they should find that, in the reconstruction of the grating, the defendant did the work improperly, and in such a manner as to make the use of the sidewalk dangerous, and that the accident in question resulted therefrom, then the plaintiffs might maintain their action over against the defendant.

The order appealed from should be affirmed. All concur.

(This case was affirmed on other grounds in 156 N. Y. 354, 50 N. E. 971, 41 L. R. A. 554, 66 Am. St. Rep. 575. Upon the question of "indemnity," see, also, *Churchill v. Holt*, 131 Mass. 67, 41 Am. Rep. 191; *Minneapolis Mill Co. v. Wheeler*, 31 Minn. 121, 16 N. W. 698; *Gridley v. Bloomington*, 68 Ill. 47; *Smith v. Foran*, 43 Conn. 244, 21 Am. Rep. 647 [master recovering indemnity from servant]; *Grand Trunk R. Co. v. Latham*, 63 Me. 177 [Id.]; *Howe v. Buffalo, N. Y. & E. R. Co.*, 37 N. Y. 297 [agent recovering indemnity from principal]. In *Oceanic Nav. Co. v. Compania*, 134 N. Y. 461, 31 N. E. 987, 30 Am. St. Rep. 685, it is held that "one who, *without fault on his own part*, has been held legally liable for the negligence of another, is entitled to indemnity from the latter." *S. P., Chicago City v. Robbins*, 2 Black, 418, 17 L. Ed. 298. But even an actual agreement or bond of indemnity will not be enforceable in favor of a person who has, in reliance upon it, committed an act *which he knows to be unlawful*, as where the bond is given to a sheriff to indemnify him in making a levy, and he levies upon goods which he knows do not belong to the judgment debtor; but where the title to the goods is matter of doubt or controversy, and the sheriff acts in good faith upon the assurance given by the creditor that he may properly proceed to make the levy, the bond is enforceable. *Nelson v. Cook*, 17 Ill. 443; *Stanton v. McMullen*, 7 Ill. App. 326; *Griffiths v. Hardenbergh*, 41 N. Y. 464; *Prewitt v. Garrett*, 6 Ala. 128, 41 Am. Dec. 40; *Collier's Adm'r v. Windham*, 27 Ala. 291, 62 Am. Dec. 767; *Gower v. Emery*, 18 Me. 79; *S. P., Avery v. Halsey*, 14 Pick. 174; *Coventry v. Barton*, 17 Johns. 142, 8 Am. Dec. 376. On like grounds, a contract of indemnity, given by the writer of a libel to the publisher of it, is void. *Atkins v. Johnson*, 43 Vt. 78, 5 Am. Rep. 260; *Shackell v. Rosier*, 2 Bing. N. C. 634.)

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## The same: effect of a release.

(45 Md. 60, 24 Am. Rep. 504.)

GUNTHER v. LEE et al.

(Court of Appeals of Maryland. June 15, 1876.)

### 1. JOINT TORT-FEASORS—RELEASE—EFFECT.

Where, pending a suit against three joint tort-feasors, a release was executed to one of them, which, in consideration of \$500, released her from all claims for the wrong, the plaintiffs thereby acknowledging themselves "to be fully paid and satisfied for all and singular the trespasses complained of," the release discharged all the joint tort-feasors from further liability.

**2. SAME—PROVISO—VALIDITY.**

In said release, which expressed the consideration on its face and was received in full satisfaction of the wrong, there was a proviso that the right to recover against the other two tort-feasors should not be affected. *Held*, that this proviso was void as being repugnant to the legal operation of the release itself.

Appeal from Circuit Court, Howard County.

Argued before BARTOL, C. J., and BOWIE, STEWART; and ALVEY, JJ.

ALVEY, J. The three defendants in this action were sued as joint tort-feasors, and the single question presented is as to the effect and operation of the release executed by the plaintiffs to one of the defendants, Mrs. Lee, during the pendency of the suit. The terms of the release are exceedingly broad and comprehensive, though it was declared that it was not to prejudice or impair the plaintiffs' claim against the other two defendants. The release was executed in consideration of five hundred dollars, and in terms released and discharged Mrs. Lee from all claims of every description, for damages accruing or accrued by reason of the wrongs complained of; the plaintiffs thereby acknowledging themselves "to be fully paid and satisfied for all and singular the trespasses complained of" by them in the suit then pending against the three defendants jointly. The court below instructed the jury that the release inured to the benefit of all the defendants, and was therefore an answer to the action, which instruction we think was properly given.

The law, as settled in England, is that a judgment in an action against one of two joint tort-feasors, of itself, without satisfaction or execution, is a sufficient bar to an action against the other for the same cause. The leading cases upon this subject are *Brown v. Wootten*, Yelv. 67; *King v. Hoare*, 13 M. & W. 494; *Brinsmead v. Harrison*, L. R. 6 C. P. 584; and same case in Ex. Ch. L. R. 7 C. P. 547.

This rule, however, to the full extent stated, is not generally accepted by the courts in this country. The opinion of Kent, C. J., in *Livingston v. Bishop*, 1 Johns. 290, 3 Am. Dec. 330, has been most generally adopted, which is to the effect that a recovery against one of several joint tort-feasors is not of itself, without satisfaction, a bar to the right to recover against the others, but fully conceding that satisfaction received of one is a complete bar to recovery against the others. The principle of *Livingston v. Bishop* has been fully sanctioned by the Supreme Court of the United States in the case of *Lovejoy v. Murray*, 3 Wall. 1, 18 L. Ed. 129. But, without determining which rule we should be disposed to adopt, if the precise question were presented, with respect to the question presented on the record before us, there is no conflict of authority whatever. All the

cases, both English and American, maintain the doctrine that satisfaction from one joint tort-feasor, whether received before or after recovery, extinguishes the right as against the others. The plaintiff is not entitled to receive more than one satisfaction for and in respect of the same injury. As was said by the court in *Lovejoy v. Murray*, when the plaintiff has accepted satisfaction in full for the injury done him, from whatever source it may come, he is so far affected, in equity and good conscience, that the law will not permit him to recover again for the same damages. And as a consideration is always implied in a release under seal, though not expressed on its face, the release by deed of one joint trespasser will discharge all; and this has been the law from very early times. *Littleton*, § 376; *Co. Litt.* 232; *Cocke v. Jennor*, *Hob.* 66; 7 *Robinson's Prac.* 206-208, and cases there referred to; *Ruble v. Turner*, 2 *Hen. & M.* 38; *Gilpatrick v. Hunter*, 24 *Me.* 18, 41 *Am. Dec.* 370; *Thurman v. Wild*, 11 *Ad. & El.* 453. Here the release expresses the consideration on its face, which was received in full satisfaction of the wrong complained of. The proviso in the release, by which the right to recover for the same injury against the other two defendants was attempted to be reserved to the plaintiffs, is simply void, as being repugnant to the legal effect and operation of the release itself. *Ruble v. Turner*, 2 *Hen. & M.* 38. The judgment must therefore be affirmed.

• Judgment affirmed.

(To the same effect are *Delong v. Curtis*, 35 *Hun.* 94; *Barrett v. Third Ave. R. Co.*, 45 *N. Y.* 628; *Rogers v. Cox*, 66 *N. J. Law*, 432, 50 *Atl.* 143; *Ayer v. Ashmead*, 31 *Conn.* 447, 83 *Am. Dec.* 154; *Brown v. City of Cambridge*, 3 *Allen*, 474; *Williams v. Le Bar*, 141 *Pa.* 149, 21 *Atl.* 525. But a "covenant not to sue" one tort-feasor does not operate as a release of either the covenantee or the other tort-feasors, but the former must resort to his suit for breach of the covenant, and the latter cannot invoke the covenant as a bar to the action against them. *City of Chicago v. Babcock*, 143 *Ill.* 358, 32 *N. E.* 271; cf. *Ellis v. Essau*, 50 *Wis.* 138, 6 *N. W.* 518, 36 *Am. Rep.* 830; *Tompkins v. Clay St. R. Co.*, 66 *Cal.* 163, 4 *Pac.* 1165. A release given to one tort-feasor, but containing a reservation of a right to sue the others, has been held to be in effect a "covenant not to sue" the one released. *Gilbert v. Finch*, 173 *N. Y.* 455, 66 *N. E.* 133, 61 *L. R. A.* 807, 93 *Am. St. Rep.* 623.)

## **Aiding and abetting the commission of a tort; ratification of a tort.**

(5 Ohio, 250.)

**BELL v. MILLER** (In part).

(Supreme Court of Ohio. December Term, 1831.)

### **TRESPASS—ASSAULT AND BATTERY—LIABILITY OF PARTIES ADVISING OR AIDING.**

A party advising or aiding in committing a trespass is liable, though not personally present at the time of committing it.

This cause was adjourned from the county of Champaign, on a motion for a new trial made by the defendant. The action was for an assault and battery. Verdict for the plaintiff; damages, sixty dollars. This reason was assigned for a new trial, viz., that the court charged the jury that if the defendant incited or in any degree promoted the commission of the assault and battery upon the plaintiff he was liable in this action, though not in a situation to afford any actual aid to the person who committed it.

**PER CURIAM.** All concerned in the commission of a trespass are considered principals. An assault and battery may be committed by a party not present, if he be a principal actor in or adviser and promoter of making the attack. If one person employ another to commit an assault and battery or any other trespass, and the act is perpetrated, both are guilty, and both responsible in damages. It was not supposed that this was now a debatable question. There is no error in the charge of the court.

New trial refused.

(In *Mack v. Kelsey*, 61 Vt. 399, 17 Atl. 780, it is said: "The rule is that all who aid, advise, command, or countenance the commission of a tort by another, or who approve of it after it is done, are liable, if done for their benefit, in the same manner as if they had done the act with their own hands; and proof that a person is present at the commission of a trespass, without disapproving or approving it, is evidence from which, in connection with other circumstances, it is competent for the jury to infer that he assented thereto, lent to it his countenance, and approved it, and was thereby aiding or abetting the same." To the same effect are the following cases: *Brown v. Perkins*, 1 Allen, 89; *Cooney v. Burke*, 11 Neb. 258, 9 N. W. 57; *Sellman v. Wheeler*, 95 Md. 751, 54 Atl. 512 [assault and battery]; *Heater v. Penrod* [Neb.] 89 N. W. 762 [conversion]; *Shaver v. Edgell*, 48 W. Va. 502, 37 S. E. 664 [trespass]; *Rhinehart v. Whitehead*, 64 Wis. 42, 24 N. W. 401; *Grossbart v. Samuel*, 65 N. J. Law, 543, 47 Atl. 501; *Southern Exp. Co. v. Couch*, 133 Ala. 285, 32 South. 167 [malicious prosecution]; *Allred v. Bray*, 41 Mo. 484, 97 Am. Dec. 283; *Drake v. Kiely*, 93 Pa. 492; cf. *Miller v. Fano*, 134 Cal. 103, 66 Pac. 183.)

(154 Mass. 330, 28 N. E. 279, 13 L. R. A. 219, 26 Am. St. Rep. 249.)

DEMPSEY v. CHAMBERS (in part).

(Supreme Judicial Court of Massachusetts. Essex. September 3, 1891.)

RATIFICATION—TORT OF PERSON ASSUMING TO ACT AS SERVANT.

Plaintiff ordered coal of defendant, which a third person, without defendant's knowledge or authority, undertook to deliver, and in so doing negligently injured plaintiff's building. Afterwards, and with knowledge of the injury, defendant demanded payment for the coal. *Held*, that defendant was liable for the injury, since such demand was a ratification of the acts of the person delivering the coal.

Exceptions from Superior Court, Essex County; Charles P. Thompson, Judge.

HOLMES, J. This is an action of tort to recover damages for the breaking of a plate-glass window. The glass was broken by the negligence of one McCulloch while delivering some coal which had been ordered of the defendant by the plaintiff. It is found as a fact that McCulloch was not the defendant's servant when he broke the window, but that the "delivery of the coal by [him] was ratified by the defendant, and that such ratification made McCulloch in law the agent and servant of the defendant in the delivery of the coal." On this finding the court ruled "that the defendant, by his ratification of the delivery of the coal by McCulloch, became responsible for his negligence in the delivery of the coal." The defendant excepted to this ruling, and to nothing else. Therefore the only question before us is as to the correctness of the ruling just stated.

If we were contriving a new code to-day we might hesitate to say that a man could make himself a party to a bare tort in any case merely by assenting to it after it had been committed. But we are not at liberty to refuse to carry out to its consequences any principle which we believe to have been part of the common law simply because the grounds of policy on which it must be justified seem to us to be hard to find, and probably to have belonged to a different state of society.

The earliest instances of liability by way of ratification in the English law, so far as we have noticed, were where a man retained property acquired through the wrongful act of another. Y. B. 30 Edw. I. 128 (Roll's Ed.); 38 Lib. Ass. 223, pl. 9; S. C. 38 Edw. III. 18; 12 Edw. IV. 9, pl. 23; Plowd. 8 ad fin. 27, 31. See Bract. 158b, 159a, 171b. But in these cases the defendant's assent was treated as relating back to the original act, and at an early date the doctrine of relation was carried so far as to hold that, where a trespass would have been justified if it had been done by the authority by which it purported to have been done, a subsequent ratification might also justify

it. Y. B. 7 Hen. IV. 34, pl. 1. This decision is qualified in Fitzh. Abr. "Baylye," pl. 4, and doubted in Brooke, Abr. "Trespass," pl. 86, but it has been followed and approved so continuously and in so many later cases that it would be hard to deny that the common law was as there stated by Chief Justice Gascoigne. Godb. 109, 110, pl. 129; 2 Leon. 196, pl. 246; Hull v. Pickersgill, 1 Brod. & B. 282; Muskett v. Drummond, 10 Barn. & C. 153, 157; Buron v. Denman, 2 Exch. 167, 178; Secretary of State v. Sahaba, 13 Moore, P. C. 22, 86; Cheetham v. Mayor, etc., L. R. 10 C. P. 249; Wiggins v. U. S., 3 Ct. Cl. 412.

If we assume that an alleged principal, by adopting an act which was unlawful when done can make it lawful, it follows that he adopts it at his peril, and is liable if it should turn out that his previous command would not have justified the act. It never has been doubted that a man's subsequent agreement to a trespass done in his name and for his benefit amounts to a command so far as to make him answerable. The *ratihabitio mandato comparatur* of the Roman lawyers and the earlier cases (D. 46, 3, 12, § 4; D. 43, 16, 1, § 14; Y. B. 30 Edw. I. 128) has been changed to the dogma *æquiparatur* ever since the days of Lord Coke, 4 Inst. 317. See Brooke, Abr. "Trespass," pl. 113, Co. Litt. 207a; Wing. Max. 124; Com. Dig. "Trespass," C. 1; Railway Co. v. Broom, 6 Exch. 314, 326, 327, and cases hereafter cited.

Doubts have been expressed, which we need not consider, whether this doctrine applied to a case of a bare personal tort. Adams v. Freeman, 9 Johns. 117, 118; Anderson and Warberton, JJ., in Bishop v. Montague, Cro. Eliz. 824. If a man assaulted another in the street out of his own head, it would seem rather strong to say that if he merely called himself my servant, and I afterwards assented, without more, our mere words would make me a party to the assault, although in such cases the canon law excommunicated the principal if the assault was upon a clerk. Sext. Dec. 5, 11, 23. Perhaps the application of the doctrine would be avoided on the ground that the facts did not show an act done for the defendant's benefit, (Wilson v. Barker, 1 Nev. & M. 409, 4 Barn. & Adol. 614; Smith v. Lozo, 42 Mich. 6, 3 N. W. 227;) as in other cases it has been on the ground that they did not amount to such a ratification as was necessary, (Tucker v. Jerris, 75 Me. 184; Hyde v. Cooper, 26 Vt. 552.)

But the language generally used by judges and text-writers, and such decisions as we have been able to find, is broad enough to cover a case like the present, when the ratification is established. Perley v. Georgetown, 7 Gray, 464; Bishop v. Montague, Cro. Eliz. 824; Sanderson v. Baker, 2 W. Bl. 832, 3 Wils. 309; Barker v. Braham, 2 W. Bl. 866, 868, 3 Wils. 368; Badkin v. Powell, Cowp. 476, 479; Wilson v. Tumman, 6 Man. & G. 236, 242; Lewis v. Read, 13 Mees. & W. 834; Buron v. Denman, 2 Exch. 167, 188; Bird v. Brown, 4

Exch. 786, 799; *Railway Co. v. Broom*, 6 Exch. 314, 326, 327; *Roe v. Railway Co.*, 7 Exch. 36, 42, 43; *Ancona v. Marks*, 7 Hurl. & N. 686, 695; *Condit v. Baldwin*, 21 N. Y. 219, 225, 78 Am. Dec. 137; *Exum v. Brister*, 35 Miss. 391; *Railway Co. v. Donahoe*, 56 Tex. 162; *Murray v. Lovejoy*, 2 Cliff. 191, 195, Fed. Cas. No. 9,963. See *Lovejoy v. Murray*, 3 Wall. 1, 9, 18 L. Ed. 129; Story, Ag. §§ 455, 456.

The question remains whether the ratification is established. As we understand the bill of exceptions, McCulloch took on himself to deliver the defendant's coal for his benefit, and as his servant, and the defendant afterwards assented to McCulloch's assumption. The ratification was not directed specifically to McCulloch's trespass, and that act was not for the defendant's benefit, if taken by itself, but it was so connected with McCulloch's employment that the defendant would have been liable as master if McCulloch really had been his servant when delivering the coal. We have found hardly anything in the books dealing with the precise case, but we are of opinion that consistency with the whole course of authority requires us to hold that the defendant's ratification of the employment established the relation of master and servant from the beginning, with all its incidents, including the anomalous liability for his negligent acts. See *Coomes v. Houghton*, 102 Mass. 211, 213, 214; *Cooley*, Torts, 128, 129. The ratification goes to the relation, and establishes it *ab initio*.

Exceptions overruled.

(See, also, the following cases in support of this doctrine: *Nims v. Mt. Hermon School*, 160 Mass. 177, 35 N. E. 776, 22 L. R. A. 364, 39 Am. St. Rep. 467; *Grund v. Van Vleck*, 69 Ill. 478; *Dunn v. Hartford & W. Horse R. Co.*, 43 Conn. 434; *Welsh v. Cochran*, 63 N. Y. 181, 184, 20 Am. Rep. 519; *Brown v. City of Webster City*, 115 Iowa, 511, 88 N. W. 1070.)

## ASSAULT AND BATTERY.

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**Nature of an assault—Difference between a civil and a criminal assault.**

(78 Ala. 463, 56 Am. Rep. 42.)

CHAPMAN v. STATE.

(Supreme Court of Alabama. December Term, 1884.)

**ASSAULT—WHAT CONSTITUTES.**

Presenting an unloaded gun at one who supposes it to be loaded, although within the distance the gun would carry if loaded, is not, without more, such an assault as can be punished criminally, although it may sustain a civil suit for damages.

Appeal from Circuit Court, Barbour County.

Indictment for assault and battery. Defendant was convicted of assault, and appealed from the judgment.

SOMERVILLE, J. The defendant was indicted for an assault and battery upon the person of one McLeod, and was convicted of a mere assault. The present conviction can be sustained only on the theory that it was an assault for the defendant to present or aim an unloaded gun at the person charged to be assaulted, in such a menacing manner as to terrify him, and within such distance as to have been dangerous had the weapon been loaded and discharged. On this question, the adjudged cases, both in this country and in England, are not agreed, and a like difference of opinion prevails among the most learned commentators of the law. We have had occasion to examine these authorities with some care on more occasions than the present, and we are of the opinion that the better view is that presenting an unloaded gun at one who supposes it to be loaded, although within the distance the gun would carry if loaded, is not, without more, such an assault as can be punished criminally, although it may sustain a civil suit for damages. The conflict of authorities on the subject is greatly attributable to a failure to observe the distinction between these two classes of cases. A civil action would rest upon the invasion of a person's "right to live in society without being put in fear of personal harm," and can often be sustained by proof of a negligent act resulting in unintentional injury. *Peterson v. Haffner*, 59 Ind. 130, 26 Am. Rep. 81; *Cooley*, Torts, 161. An indictment for the same act could be sustained only upon satisfactory proof of criminal intention to do personal harm to another by

violence. *State v. Davis*, 23 N. C. 125, 35 Am. Dec. 735. The approved definition of an "assault" involves the idea of an inchoate violence to the person of another, with the present means of carrying the intent into effect. 2 Greenl. Ev. § 82; Rosc. Crim. Ev. (7th Ed.) 296; *People v. Lilley*, 43 Mich. 521, 5 N. W. 982. Most of our decisions recognize the old view of the text-books, that there can be no criminal assault without a present intention, as well as present ability, of using some violence against the person of another. 1 Russ. Crimes, (9th Ed.) 1019; *State v. Blackwell*, 9 Ala. 79; *Tarver v. State*, 43 Ala. 354. In *Lawson v. State*, 30 Ala. 14, it was said that, "to constitute an assault, there must be the commencement of an act which, if not prevented, would produce a battery." The case of *Balkum v. State*, 40 Ala. 671, which was decided by a divided court, probably does not harmonize with the foregoing decisions. It is true that some of the modern text-writers define an assault as an apparent attempt by violence to do corporal hurt to another, thus ignoring entirely all question of any criminal intent on the part of the perpetrator. 1 Whart. Crim. Ev. § 603; 2 Bish. Crim. Law, § 32. The true test cannot be the mere tendency of an act to produce a breach of the peace; for opprobrious language has this tendency, and no words, however violent or abusive, can, at common law, constitute an assault. It is unquestionably true that an apparent attempt to do corporal injury to another may often justify the latter in promptly resorting to measures of self-defense. But this is not because such apparent attempt is itself a breach of the peace, for it may be an act entirely innocent. It is rather because the person who supposes himself to be assaulted has a right to act upon appearances, where they create reasonable grounds from which to apprehend imminent peril. There can be no difference, in reason, between presenting an unloaded gun at an antagonist in an affray, and presenting a walking cane, as if to shoot, provided he honestly believes, and from the circumstances has reasonable ground to believe, that the cane was a loaded gun. Each act is a mere menace, the one equally with the other; and mere menaces, whether by words or acts, without intent or ability to injure, are not punishable crimes, although they may often constitute sufficient ground for a civil action for damages. The test, moreover, in criminal cases, cannot be the mere fact of unlawfully putting one in fear, or creating alarm in the mind; for one may obviously be assaulted, although in complete ignorance of the fact and therefore entirely free from alarm. *People v. Lilley*, 43 Mich. 525, 5 N. W. 982. And one may be put in fear under pretense of begging, as in *Taplin's Case*, occurring during the riots in London, decided in 1780, and reported in 2 East, P. C. 712, and cited in many of the other old authorities. These views are sustained by the spirit of our own adjudged cases, cited above, as well as by the following authorities, which are directly in point: 2 Green, Crim. Law Rep.

and note on pages 271-275, where all the cases are fully reviewed; 2 Add. Torts, (Wood's Ed. 1881,) § 788, note, pages 4-7; Rosc. Crim. Ev. (7th Ed.) 296; 1 Russ. Crimes, (9th Ed.) 1020; Blake v. Barnard, 9 Car. & P. 626; Reg. v. James, 1 Car. & K. 530; Robinson v. State, 31 Tex. 170; McKay v. State, 44 Tex. 43; State v. Davis, 35 Am. Dec. 735. The opposite view is sustained by the following authors and adjudged cases: 7 Bish. Crim. Law, (7th Ed.) § 32; 1 Whart. Crim. Law, (9th Ed.) §§ 182, 603; Reg. v. St. George, 9 Car. & P. 483; Com. v. White, 110 Mass. 407; State v. Shepard, 10 Iowa, 126; State v. Smith, 2 Humph. 457. See, also, 3 Greenl. Ev. (14th Ed.) § 59, note b; 1 Archb. Crim. Pr. & Pl. (Pom. Ed.) 282, 283, 907; State v. Benedict, 11 Vt. 238, 34 Am. Dec. 688; State v. Neely, 74 N. C. 425, 21 Am. Rep. 496. The rulings of the court were opposed to these views, and the judgment must therefore be reversed, and the cause remanded.

(Beach v. Hancock, 27 N. H. 223, 59 Am. Dec. 373, holds that a civil action will lie for aiming an unloaded pistol within shooting distance, with an apparent purpose of firing. Comm. v. White, 110 Mass. 407, holds such an act to be also a criminal assault; while State v. Sears, 86 Mo. 169; State v. Godfrey, 17 Or. 300, 20 Pac. 625, 11 Am. St. Rep. 830—are to the contrary. See, also, People v. Lilley, 43 Mich. 521, 5 N. W. 982; Bishop v. Ranney, 59 Vt. 316, 7 Atl. 820.)

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(3 Carr. & P. 373.)

MORTIN v. SHOPPEE.

(Court of King's Bench. October 27, 1828.)

**ASSAULT—WHAT CONSTITUTES.**

Riding after a person, so as to compel him to run to shelter to avoid being beaten, is, in law, an assault.

Action for assault. Plea, the general issue. The plaintiff was walking along a footpath, by the road-side, at Hillingdon, and the defendant, who was on horseback, rode after him at a quick pace. The plaintiff ran away, and got into his own garden, when the defendant rode up to the garden gate, (the plaintiff then being in the garden about three yards from him,) and, shaking his whip, said: "Come out, and I will lick you before your own servants."

Mr. Denman, C. S., for defendant, objected that this did not amount to an assault.

TENTERDEN, C. J. If the defendant rode after the plaintiff, so as to compel him to run into his garden for shelter, to avoid being beaten, that is in law an assault.

Verdict for the plaintiff. Damages, 40s.

(See, also, State v. Sims, 3 Stro. 137.)

(4 Carr. &amp; P. 349.)

## STEPHENS v. MYERS.

(Court of Common Pleas. July 17, 1830.)

## ASSAULT—WHAT CONSTITUTES.

Advancing in a threatening attitude and with intent to strike another, so that the blow would almost immediately reach him, is, in law, an assault by the person advancing with such intent, although he is stopped before he is near enough to the other to strike him.

Action for assault. The declaration stated that the defendant threatened and attempted to assault the plaintiff. Plea, not guilty. It appeared that the plaintiff was acting as chairman at a parish meeting, and sat at the head of a table, at which table the defendant also sat; there being about six or seven persons between him and the plaintiff. The defendant having, in the course of some angry discussion which took place, been very vociferous, and interrupted the proceedings of the meeting, a motion was made that he should be turned out, which was carried by a very large majority. Upon this the defendant said he would rather pull the chairman out of the chair than be turned out of the room, and immediately advanced, with his fist clenched, towards the chairman, but was stopped by the church-warden, who sat next but one to the chairman, at a time when he was not near enough for any blow he might have meditated to have reached the chairman; but the witnesses said that it seemed to them that he was advancing with an intention to strike the chairman.

Mr. Spankie, Serjt., for the defendant, upon this evidence, contended that no assault had been committed, as there was no power in the defendant, from the situation of the parties, to execute his threat; there was not a present ability; he had not the means of executing his intention at the time he was stopped.

TINDAL, C. J., in his summing up, said it is not every threat, when there is no actual personal violence, that constitutes an assault; there must, in all cases, be the means of carrying the threat into effect. The question I shall leave to you will be whether the defendant was advancing at the time, in a threatening attitude, to strike the chairman, so that his blow would almost immediately have reached the chairman, if he had not been stopped. Then, though he was not near enough at the time to have struck him, yet if he was advancing with that intent I think it amounts to an assault in law. If he was so advancing that, within a second or two of time, he would have reached the plaintiff, it seems to me it is an assault in law. If you think he was not advancing to strike the plaintiff, then only can you find your verdict for the defendant; otherwise you must find it for

the plaintiff, and give him such damages as you think the nature of the case requires.

Verdict for the plaintiff. Damages, *1s.*

(An American case on all fours with this is *State v. Vannoy*, 65 N. C. 532. For a good definition of an assault, see *Hays v. People*, 1 Hill, 351; *Bishop v. Ranney*, 59 Vt. 316, 7 Atl. 820; *State v. Horne*, 92 N. C. 805, 53 Am. Rep. 442; *People v. Lilley*, 43 Mich. 521, 5 N. W. 982; *Johnson v. State*, 35 Ala. 363. Words alone, however threatening, violent, or opprobrious, will not constitute an assault. *Cooley on Torts* [2d Ed.] 185, note, and cases cited.)

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### Effect of accompanying words indicating that there is no intent to do actual violence.

(23 N. C. 375.)

STATE v. CROW.

(Supreme Court of North Carolina. June Term, 1841.)

#### ASSAULT—WORDS INDICATING INTENT.

At the trial of an indictment for assault, there was evidence that defendant, in a quarrel with another, raised a whip and shook it at him, saying at the same time, "Were you not an old man, I would knock you down;" but he did not strike, although within striking distance, and not prevented by any one. *Held*, that the jury might consider such words, if used by defendant, as tending to qualify his acts; and that if at the time he raised his whip he had no present purpose to strike, it was not, in law, an assault.

Appeal from Superior Court, Rutherford County; Battle, Judge.

Indictment against Abraham Crow for assault on William Grayson. At the trial, a witness testified that he heard some words between the parties, and then saw defendant raise his whip, and shake it at Grayson, and heard him swear that he had a great mind to kill Grayson, and that defendant was at the time within striking distance of Grayson, but did not strike him, although no one interfered. One or two others testified that they did not see defendant raise the whip, but heard him say to Grayson, "Were you not an old man, I would knock you down." On behalf of defendant, his counsel argued that these words, accompanying his acts, qualified them, and showed that he had no intention of striking, and that consequently there was no such offer or attempt to strike as would constitute an assault. The court charged the jury that, even though such words were used by defendant when he raised his whip and shook it at Grayson, yet if his conduct was such as would induce a man of ordinary firmness to suppose he was about to be stricken, and to strike his assailant in self-defense, the latter would be guilty. Otherwise there might be a fight, and the peace broken, and yet neither party be guilty. And,

further, that otherwise one man might follow another all over the court-yard, shaking a stick over his head, and yet not be guilty, provided he took care to declare, while he was doing so, that "he had a great mind to knock him down." The jury found defendant guilty. A motion by him for a new trial was denied and judgment was pronounced against him. From the judgment he appealed.

The Attorney General, for the State, cited Archb. Crim. Pl. 347; Hawkins, c. 52, § 1.

No counsel appeared for defendant.

DANIEL, J. The judge charged the jury "that if the conduct of the defendant was such as would induce a man of ordinary firmness to suppose he was about to be stricken, and to strike in self-defense, the defendant would by such conduct be guilty of an assault." We admit that such conduct would be strong evidence to prove, what every person who relies on the plea of son assault demesne must prove to support his plea, to-wit, that his adversary first attempted or offered to strike him; but it is not conclusive evidence of that fact, for if it can be collected, notwithstanding appearances to the contrary, that there was not a present purpose to do an injury, there is no assault. *State v. Davis*, 23 N. C. 127, 35 Am. Dec. 735. The law makes allowance to some extent for the angry passions and infirmities of man. It seems to us that the words used by the defendant, contemporaneously with the act of raising his whip, were to be taken into consideration, as tending to qualify that act, and show that he had no intention to strike. The defendant did not strike, although he had an opportunity to do so, and was not prevented by any other person. The judge should, as it seems to us, have told the jury that if, at the time he raised his whip and made use of the words, "Were you not an old man, I would knock you down," the defendant had not a present purpose to strike, in law it was not an assault. We again repeat what was said in *Davis' Case*: "It is difficult to draw the precise line which separates violence menaced from violence begun to be executed, for, until the execution of it be begun, there can be no assault." The evils which the judge supposed might follow, if the law was different from what he stated it to be, can always be obviated by the offending party's being bound to his good behavior. There must be a new trial.

New trial awarded.

(The rule is the same in civil and criminal cases. *Tuberville v. Savage*, 1 Mod. 3; *Com. v. Eyre*, 1 Serg. & R. 347. Compare *State v. Hampton*, 63 N. C. 13.)

## Nature of a battery.

(6 Mod. 149.)

COLE v. TURNER.

(Court of King's Bench. Easter Term, 1794.)

### ASSAULT AND BATTERY—WHAT CONSTITUTES A BATTERY.

To touch another in anger, though in the slightest degree, or to use violence against another to rudely force a passage, is, in law, a battery.

Before HOLT, C. J., at nisi prius.

HOLT, C. J., upon evidence in trespass for assault and battery, declared—First, that the least touching of another in anger is a battery; secondly, if two or more meet in a narrow passage, and, without any violence or design of harm, the one touches the other gently, it will be no battery; thirdly, if any of them use violence against the other, to force his way in a rude, inordinate manner, it will be a battery, or any struggle about the passage to that degree as may do hurt will be a battery.

(Spitting in a person's face has been held to be a battery. *Draper v. Baker*, 61 Wis. 450, 21 N. W. 527, 50 Am. Rep. 143. And so of holding a woman's arms and kissing her against her will. *Craker v. Chicago & N. W. R. Co.*, 38 Wis. 657, 17 Am. Rep. 504.)

(88 Ala. 100, 7 South. 154.)

ENGELHARDT v. STATE (in part).

(Supreme Court of Alabama. January 15, 1890.)

### ASSAULT AND BATTERY—WHAT CONSTITUTES A BATTERY.

Defendant approached another, holding a stick raised, within striking distance, as if to strike the latter, and, when prevented by the act of the latter in wrenching the stick from him, drew a pistol. The other seized and turned aside the hand holding the pistol as it was discharged, and they struggled together, until defendant fell or was forced to the ground, the pistol being again discharged in the air during the struggle. *Held*, that such laying hold of each other's persons in a rude and hostile manner constituted a battery, and that, there being no justification therefor on the part of defendant, he was guilty of an assault and battery.

Appeal from City Court of Montgomery; Thomas Arrington, Judge.

Indictment against John Engelhardt for an assault on W. F. Vandiver with intent to murder him. The assault was committed on the sidewalk in front of the defendant's store, in the city of Montgomery, where Vandiver was standing with one J. Faunce. Vandiver testi-

fied that the defendant passed him a few moments before the assault and came back, and said to him, "You have not treated me right;" that he attempted to pass into his store, but was intercepted by the defendant, who "jumped back and drew his pistol;" that after deliberation, "thinking that there was no fight in him," witness commenced advancing on him, having in his hand an open pen-knife, with which he had been cleaning his finger nails; that the defendant fired at him, pointing his pistol towards him, but witness clinched him, and got control of the pistol; that the pistol was again discharged during the struggle between them, but he succeeded in getting the defendant down, and held him down, with the aid of Faunce. Faunce testified, on the part of the prosecution, that the defendant, when he approached Vandiver, had a small cane in his hand, which he raised when within striking distance, but Vandiver wrenched it from his hand; that the defendant then drew his pistol, which was self-cocking, and Vandiver caught his right hand, and turned the pistol aside as it was discharged, the ball striking the ground; and that the weapon was again discharged during the struggle between them, or as the defendant was falling. The court charged the jury that, "if they believe the evidence, the defendant was guilty of an assault, or an assault and battery." The defendant excepted to this charge. The jury found defendant guilty of assault and battery, and he was fined \$300. Defendant appealed from the judgment of conviction.

SOMERVILLE, J. 1. The court, in our opinion, committed no error in charging the jury that, if they believed the evidence, the defendant was guilty of assault, or assault and battery. There was undoubtedly an attempt or offer, on the defendants' part, with force and violence, to do a corporal hurt to the prosecutor,—an attempt manifested both by aiming and firing a loaded pistol in the direction of his person, and by raising a stick, within striking distance, as if to strike him, which was prevented by his wrenching the stick from the defendant's hand. This was clearly an assault, constituting, as it did, one or more acts, either of which, if consummated, would have resulted in a battery. *Chapman v. State*, 78 Ala. 463, 56 Am. Rep. 42, ante, p. 185.

2. The evidence, moreover, shows a battery, which is "the unlawful application of violence to the person of another." May, *Crim. Law*, § 55; *Com. v. McKie*, 61 Am. Dec. 410. "A battery is not necessarily a forcible striking with the hand or stick, or the like, but includes every touching or laying hold (however trifling) of another's person or his clothes, in an angry, revengeful, rude, insolent, or hostile manner." 1 *Amer. & Eng. Enc. Law*, 783. There is no conflict in that part of the evidence showing the circumstances attending the difficulty. To prevent being shot by the pistol, the prosecutor, Vandiver, seized the defendant's right hand, which contained the weapon,

forcing its discharge in the air. The use of the stick was interrupted in like manner by its seizure. The combatants "clinched" and "struggled together," the defendant either falling in the struggle, or being pushed backward to the ground, and firing his pistol a second time in the air. The prosecutor and a by-stander thereupon got on the defendant, and held him down. He may or may not have used more force than was necessary to resist the assault by the defendant. This is entirely immaterial, for had both of the combatants fought willingly together, and neither in self-defense, each would have been guilty of an assault and battery on the other. *Com. v. Collberg*, 119 Mass. 350, 20 Am. Rep. 328; *Adams v. Waggoner*, 33 Ind. 531, 5 Am. Rep. 230. The language describing the contest necessarily implies a contention or striving together for the mastery, one of the other,—a laying hold of each other's person in a rude and hostile manner. This was a battery. It may have been justifiable on the part of the person assailed, and no doubt was. But there is no sort of pretext that the act was justifiable on the part of the defendant. There was no error in the charge on this subject to which exception was taken.

The judgment must be affirmed.

("An assault and battery consists in the unlawful and unjustifiable use of force and violence upon the person of another, however slight. If justifiable, it is not an assault and battery." *Comm. v. McKie*, 1 Gray, 61, 63, 61 Am. Dec. 410; cf. *Jacobi v. State*, 133 Ala. 1, 32 South. 158; *State v. Mills*, 3 Pennewill (Del.) 508, 52 Atl. 266.)

## Assault and battery—Effect of consent.

(45 Ohio St. 177, 12 N. E. 185, 4 Am. St. Rep. 535.)

BARHOLT v. WRIGHT (in part).

(Supreme Court of Ohio. May 10, 1887.)

### ASSAULT AND BATTERY—CONSENT.

It is no defense to an action for assault and battery that the acts complained of were committed in a fight engaged in by mutual consent, although such consent may be shown in mitigation of damages.

Error to Circuit Court, Portage County.

Action for assault and battery. The evidence showed that plaintiff and defendant went out to fight by agreement, and did fight, and plaintiff was severely injured; one of his fingers being so bitten, among other things, that it had to be amputated. The court charged that, if the parties fought by agreement, plaintiff could not recover, and a verdict was returned for defendant. Upon error to the circuit court a new trial was ordered. Defendant now brings error to reverse that order.

MINSHALL, J. It would seem at first blush contrary to certain general principles of remedial justice to allow a plaintiff to recover damages for an injury inflicted on him by a defendant in a combat of his own seeking; or where, as in this case, the fight occurred by an agreement between the parties to fight. Thus, in cases for damages resulting from the clearest negligence on the part of the defendant, a recovery is denied the plaintiff if it appear that his own fault in any way contributed to the injury of which he complains. And a maxim as old as the law, *volenti non fit injuria*, forbids a recovery by a plaintiff where it appears that the ground of his complaint had been induced by that to which he had assented; for, in judgment of law, that to which a party assents is not deemed an injury. Broom, Leg. Max. 268. But as often as the question has been presented, it has been decided that a recovery may be had by a plaintiff for injuries inflicted by the defendant in a mutual combat, as well as in a combat where the plaintiff was the first assailant, and the injuries resulted from the use of excessive and unnecessary force by the defendant in repelling the assault. These apparent anomalies rest upon the importance which the law attaches to the public peace as well as to the life and person of the citizen. From considerations of this kind it no more regards an agreement by which one man may have assented to be beaten than it does an agreement to part with his liberty, and become the slave of another. But the fact that the injuries were received in a combat in which the parties had engaged by mutual agreement may be shown in mitigation of damages. 2 Greenl. Ev. § 85; Logan v. Austin, 1 Stew. 476. This, however, is the full extent to which the cases have gone. We will notice a few of them. In Boulter v. Clark, an early case, an offer was made, under the general issue, to show that the plaintiff and the defendant fought by consent. The offer was denied; the chief baron saying: "The fighting being unlawful, the consent of the plaintiff to fight, if proved, would be no bar to his action." Bull. N. P. 16. A number of earlier cases were cited, and among them that of Matthew v. Ollerton, Comb. 218, where it is said "that, if a man license another to beat him, such license is void, because it is against the peace." It will be found upon examination that this case was not for an assault and battery; it was on an award that had been made by the plaintiff on a submission to himself. The remark, however, made in the reasoning of the court, is evidence of the common understanding of the law at that early day. In 1 Steph. N. P. 211, it is said: "If two men engage in a boxing match, an action can be sustained by either of them against the other, if an assault be made; because the act of boxing is unlawful, and the consent of the parties to fight cannot excuse the injury." So in Bell v. Hansley, 48 N. C. 131, it was held that "one may recover in an action for assault and battery, although he agreed to fight with his adversary; for, such agreement to break the peace being void, the

maxim, volenti non fit injuria, does not apply." The following cases are to the same effect: *Stout v. Wren*, 1 Hawks, 420; *Adams v. Waggoner*, 33 Ind. 531, 5 Am. Rep. 230; *Shay v. Thompson*, 59 Wis. 540, 18 N. W. 473, 48 Am. Rep. 538; *Logan v. Austin*, 1 Stew. 476. And so it was held in *Com. v. Collberg*, 119 Mass. 350, 20 Am. Rep. 328, that where two persons go out to fight with their fists, by consent, and do fight with each other, each is guilty of an assault, although there is no anger or mutual ill will. It is said by Judge Cooley in his work on Torts (page 163) that "consent is generally a full and perfect shield when that is complained of as a civil injury which was consented to. \* \* \* A man may not even complain of the adultery of his wife which he connived at or assented to. If he concurs in the dishonor of his bed, the law will not give him redress, because he is not wronged. These cases are plain enough, because they are cases in which the questions arise between the parties alone." "But," he adds, "in case of a breach of the peace it is different. The state is wronged by this, and forbids it on public grounds. \* \* \* The rule of law is therefore clear and unquestionable that consent to an assault is no justification. The exception to this general rule embraces only those cases in which that to which assent is given is matter of indifference to public order." See, also, to like effect, *Pollock on Torts*, 139. Neither is the case of *Champer v. State*, 14 Ohio St. 437, at variance with the principle upon which the plaintiff below seeks a recovery. The case seems to have been somewhat misapprehended by the courts of some of the states, as well as by some text-writers. By the statutes of this state a distinct offense is made of an affray or agreement to fight; and the effect of the holding is that where such an offense is committed the indictment must be for an affray, and not for an assault and battery. The civil right of either party to recover of the other for injuries received in an affray is not affected by the statute, nor by the decision just referred to. Such seems to have been the view taken by Boynton, J., in the subsequent case of *Darling v. Williams*, 35 Ohio St. 63. The case of *Fitzgerald v. Cavin*, 110 Mass. 153, is to the effect that consent is no bar to that which occasions bodily harm, if the act was intentionally done. It is upon the same principle of public policy that one who is the first assailant in a fight may recover of his antagonist for injuries inflicted by the latter, where he oversteps what is reasonably necessary to his defense, and unnecessarily injures the plaintiff; or that, with apparent want of consistency, permits each to bring an action in such case, the assaulted party for the assault first committed upon him, and the assailant for the excess of force used beyond what was necessary for self-defense. *Dole v. Erskine*, 35 N. H. 503; criticising *Elliott v. Brown*, 2 Wend. 499, 20 Am. Dec. 644; *Cooley*, Torts, 165; *Darling v. Williams*, 35 Ohio St. 63; *Gizler v. Witzel*, 82 Ill. 322. And see, also, *Com. v. Collberg*, supra. And upon like

principle it has been ruled that the doctrine of contributory negligence has no application to an action to recover damages for an assault and battery. *Ruter v. Foy*, 46 Iowa, 132; *Steinmetz v. Kelly*, 72 Ind. 442, 37 Am. Rep. 170; *Whitehead v. Mathaway*, 85 Ind. 85. Negligence of the plaintiff contributing to the injury of which he complains is taken into consideration only in those cases where the liability of the defendant arises from want of care on his part, occasioning injury to the plaintiff; it does not apply to the commission of an intentional wrong. We think the court erred in its charge to the jury. The injury inflicted, the loss of a finger, was a severe one; it amounted in fact to a mayhem. "Where the injury," (a mayhem,) says the author of a recent and quite valuable work on Criminal Procedure, "takes place during a conflict, it is not necessary to a conviction that the accused should have formed the intent before engaging in the conflict. It is sufficient if he does the act voluntarily, unlawfully, and on purpose." *Maxw. Crim. Proc.* 260. It was permissible to the defendant to show the agreement to fight in mitigation of damages, but not as a bar to the action.

Judgment affirmed.

(See, also, *Grotton v. Glidden*, 84 Me. 589, 24 Atl. 1008, 30 Am. St. Rep. 413; *Gutzman v. Clancy*, 114 Wis. 589, 90 N. W. 1081, 58 L. R. A. 744; *McNatt v. McRae*, 117 Ga. 898, 45 S. E. 248; *State v. Burnham*, 56 Vt. 445, 48 Am. Rep. 801; *State v. Newland*, 27 Kan. 764; *Jones v. Gale*, 22 Mo. App. 637; *Willey v. Carpenter*, 64 Vt. 212, 23 Atl. 630, 15 L. R. A. 853; cf. *Fitzgerald v. Cavin*, 110 Mass. 153; *Pillow v. Bushnell*, 5 Barb. 156. Even if plaintiff, by his actions and words, invited the fight in which he was injured, he may still recover damages for such injuries. *Lund v. Tyler*, 115 Iowa, 236, 88 N. W. 333.)

## Justifiable and excusable assaults and batteries.

### — A. Self-defense—Defense of property.

(4 Denio, 448, 47 Am. Dec. 265.)

SCRIBNER v. BEACH.

(Supreme Court of New York. May, 1847.)

#### JUSTIFIABLE OR EXCUSABLE ASSAULT—SELF-DEFENSE—DEFENSE OF PROPERTY.

Plaintiff having made charcoal on land which defendant had previously occupied, defendant came to the place, during plaintiff's absence therefrom, and began raking out the coal from the pit with a rake. Plaintiff, returning, took hold of the rake to take it from defendant, and defendant knocked him down. Plaintiff again attempted to take the rake, and defendant struck him with it and broke his arm. *Held*, that there was a manifest disproportion between the assault by plaintiff and the battery by defendant, and the latter was not justified, either on the ground of self-defense, or of defense of possession of the coal, even if defendant had title thereto.

## Motion for new trial.

Action of trespass for assaulting plaintiff. Defendant pleaded not guilty, with notice of son assault demesne, and that the assault was committed in defense of defendant's personal property, namely, a pit of charcoal and a coal rake. At the trial it appeared that the assault occurred on land of which defendant had been in possession about three years previously; that, defendant having removed to another county, plaintiff had taken possession of the land, and had burned charcoal upon it. While plaintiff was absent, for the purpose of taking the coal to market, defendant came to the pit, and began taking out the coal with a rake which he found there, having also a wagon in which to remove the coal. Plaintiff, returning, asked defendant what he was doing, to which defendant answered that if plaintiff would come there he would show him. Plaintiff then took hold of the rake, for the purpose of taking it from defendant, who, with one hand, knocked plaintiff down. Plaintiff arose, and again took hold of the rake; but defendant pulled it away, and with it aimed a blow at plaintiff's head, which the latter sought to prevent by putting up his hand. The rake struck his arm near the wrist, and fractured it. Defendant offered proof that he had title to the land on which the coal was burned, which was uncultivated and unimproved; and that the coal was made from his wood cut upon that land; but on objection by plaintiff's counsel to this evidence, it was excluded. The jury found a verdict for plaintiff for \$150. Defendant moved for a new trial on a case.

JEWETT, J. Self-defense is a primary law of nature, and it is held an excuse for breaches of the peace, and even for homicide itself. But care must be taken that the resistance does not exceed the bounds of mere defense, prevention, or recovery, so as to become vindictive; for then the defender would himself become the aggressor. The force used must not exceed the necessity of the case. *Elliott v. Brown*, 2 Wend. 497, 20 Am. Dec. 644; *Gates v. Lounsbury*, 20 Johns. 427; *Gregory v. Hill*, 8 Term R. 299; *Baldwin v. Hayden*, 6 Conn. 453; 3 Bl. Comm. 3-5; 1 Hawk. P. C. 130; *Cockcroft v. Smith*, 2 Salk. 642; *Curtis v. Carson*, 2 N. H. 539. A man may justify an assault and battery in defense of his lands or goods, or of the goods of another delivered to him to be kept. Hawk. P. C. bk. 1, c. 60, § 23; *Seaman v. Cuppledick*, Owen, 150. But in these cases, unless the trespass is accompanied with violence, the owner of the land or goods will not be justified in assaulting the trespasser in the first instance, but must request him to depart or to desist, and, if he refuses, he should gently lay his hands on him for the purpose of removing him, and, if he resist with force, then force sufficient to expel him may be used in return by the owner. *Weaver v. Bush*, 8 Term R. 78; Bull. N. P. 19; 1 East, P. C. 406. It is otherwise if the trespasser

enter the close with force. In that case the owner may, without previous request to depart or desist, use violence in return, in the first instance, proportioned to the force of the trespasser, for the purpose only of subduing his violence. "A civil trespass," says Holroyd, J., "will not justify the firing a pistol at the trespasser in sudden resentment or anger. If a person takes forcible possession of another's close, so as to be guilty of a breach of the peace, it is more than a trespass; so if a man with force invades and enters the dwelling-house of another. But a man is not authorized to fire a pistol on every invasion or intrusion into his house. He ought, if he has a reasonable opportunity to endeavor to remove the trespasser without having recourse to the last extremity." *Meade's Case*, Lewin, 185; *Rosc. Crim. Ev.* 262. The rule is that, in all cases of resistance to trespassers, the party resisting will be guilty in law of an assault and battery, if he resists with such violence that it would, if death had ensued, have been manslaughter. Where one manifestly intends and endeavors, by violence or surprise, to commit a known felony upon a man's person, (as to rob, or murder, or to commit a rape upon a woman,) or upon a man's habitation or property, (as arson or burglary,) the person assaulted may repel force by force; and even his servant, then attendant on him, or any other person present, may interpose for preventing mischief; and in the latter case the owner, or any part of his family, or even a lodger with him, may kill the assailant, for preventing the mischief. *Fost. Cr. Law*, 273. In respect to personal property, the right of recaption exists, with the caution that it be not exercised violently, or by breach of the peace; for, should these accompany the act, the party would then be answerable criminally. But the riot or force would not confer a right on a person who had none; nor would they subject the owner of the chattel to a restoration of it to one who was not the owner. *Hyatt v. Wood*, 4 Johns. 150, 4 Am. Dec. 258. In the case of personal property, improperly detained or taken away, it may be taken from the house and custody of the wrong-doer, even without a previous request; but unless it was seized, or attempted to be seized, forcibly, the owner cannot justify doing anything more than gently laying his hands on the wrong-doer to recover it. *Weaver v. Bush*, *supra*; *Com. Dig.* "Pleader," 3 M, 17; *Spencer v. McGowen*, 13 Wend. 256. In one branch of the defense the defendant set up son assault demesne. That was overthrown by evidence showing a manifest disproportion between the battery given and the first assault. Even a wounding was proved. The defendant also relied upon a defense of his possession of certain personal property, which he insisted was invaded by the plaintiff, and in the defense of which he committed the assault. To sustain this defense, he proposed to prove that the coal-pit was on new and unimproved land, to which he had title, and that the wood from which the coal was made was cut from this land without any au-

thority from him; but this evidence was rejected. The object of the strife between the parties was the possession of the rake, not the coal. The plaintiff is not shown to have committed a single act tending to disturb the defendant in his possession of the latter. The ownership of the coal, therefore, was not a material fact. But admitting that the defendant had a legal title to the coal, and that the plaintiff's object in regaining possession of the rake was to use it as a means of retaking the possession of the coal, still the defendant could not justify the wounding merely in defense of his possession. *Gregory v. Hill*, *supra*. Unless the plaintiff first attempted forcibly to take the coal, of which there was no proof, I think the evidence was immaterial, and was properly overruled.

New trial denied.

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(131 Mass. 423.)

#### COMMONWEALTH v. O'MALLEY.

(Supreme Judicial Court of Massachusetts. October 11, 1881.)

##### JUSTIFIABLE OR EXCUSABLE ASSAULT—SELF-DEFENSE—KILLING ASSAILANT.

A person attacked is justified in defending himself by shooting his assailant, if he has reason to believe that the assailant intends to do him great bodily harm, and that he is in danger of such harm, and that no other means can effectually prevent it.

##### Exceptions from Superior Court.

Indictment against William O'Malley for the manslaughter of Malachi Grady. At the trial it appeared that, previous to the killing of Grady, he and defendant had had a dispute, and Grady had made threats against defendant; that, on the morning of the day on which the killing occurred, there were further angry words between them about the same matter at defendant's house; that Grady left the house, and, a few hours afterwards, they met on the street; that Grady then violently attacked defendant, and gave him several serious blows on and about the head and face; and that, in the course of this encounter, defendant shot Grady with a pistol, inflicting a wound from the effects of which Grady died. Defendant requested the judge to instruct the jury that, if defendant had reason to believe that Grady intended to do him great bodily harm, and had reason to believe he was in danger of great bodily harm, he would be justified in defending himself by shooting his assailant. The judge gave the instruction requested, but inserted after the words, "danger of great bodily harm," and before the words, "he would be justified," the words, "which no other means could effectually prevent." The jury returned a verdict of guilty, and the defendant alleged exceptions.

GRAY, C. J. According to the manifest intent and natural meaning of the instruction given to the jury, the qualification, "if the defendant had reason to believe," applied to the clause, "which no other means could effectually prevent," as well as to the rest of the proposition laid down by the court. In legal effect, as in common understanding, the instruction was that if the defendant had reason to believe that his assailant intended to do him great bodily harm, and that he was in danger of such harm, which, as he had reason to believe, no other means could effectually prevent, he would be justified in defending himself by shooting him. Anything less than this would clearly afford no justification. Trial of Selfridge, 160; Comm. v. Woodward, 102 Mass. 155, 161. The suggestion in argument that the instruction excluded all other means of self-defense which might result in the death of the assailant than shooting is a strained interpretation, which there is nothing in the bill of exceptions to show could have been applied to the evidence before the jury.

Exceptions overruled.

(See also as to self-defense, *People v. Johnson*, 139 N. Y. 358, 34 N. E. 920; *Panton v. People*, 114 Ill. 505, 2 N. E. 411; *State v. Gibson* [Or.] 73 Pac. 333; *Germolus v. Sausser* [Minn.] 85 N. W. 946; *Marts v. State*, 26 Ohio St. 162; as to defense of brother, *State v. Greer*, 22 W. Va. 800; as to defense of one's land, *Com. v. Clark*, 2 Metc. [Mass.] 23; *Hannabalson v. Sessions*, 116 Iowa, 457, 90 N. W. 93, 93 Am. St. Rep. 250; *Kiff v. Youmans*, 86 N. Y. 324, 40 Am. Rep. 543; *State v. Kaiser*, 78 Mo. App. 575; as to defense of one's home, *State v. Middleham*, 62 Iowa, 150, 17 N. W. 446; *Fostbinder v. Svitak*, 16 Neb. 499, 20 N. W. 866; *State v. Peacock*, 40 Ohio St. 333; as to defense of chattels, *People v. Dann*, 53 Mich. 490, 19 N. W. 159, 51 Am. Rep. 151; *Wright v. So. Exp. Co.* [C. C.] 80 Fed. 85; as to defense of a third person, *State v. Totman*, 80 Mo. App. 125. The authorities differ as to the right to use force to *regain possession of land*. Thus in some states it is held that if the owner of land only uses the force reasonably necessary to expel the person in wrongful possession, he is not liable civilly for assault and battery, though he may be criminally for a breach of the peace. *Souter v. Codman*, 14 R. I. 119, 51 Am. Rep. 364; *Lambert v. Robinson*, 162 Mass. 34, 37 N. E. 753, 44 Am. St. Rep. 326. But in New York it is held that the owner is civilly liable for assault and battery in such a case, and that he should regain possession by legal proceedings instead of by force. *Bristol v. Burr*, 120 N. Y. 427, 24 N. E. 937, 8 L. R. A. 710.)

(148 Mass. 529, 20 N. E. 171, 2 L. R. A. 623, 12 Am. St. Rep. 591.)

COMMONWEALTH v. DONAHUE.

(Supreme Judicial Court of Massachusetts. February 28, 1889.)

JUSTIFIABLE OR EXCUSABLE ASSAULT—RECAPTION OF PROPERTY.

One whose personal property is taken wrongfully by another may re-take it from him immediately afterwards, using reasonable force. What is such force is a question of fact for the jury.

Exceptions from Superior Court, Franklin County.

Indictment against Thomas Donahue for robbery. Defendant was convicted of assault, and alleged exceptions.

HOLMES, J. This is an indictment for robbery, in which the defendant has been found guilty of an assault. The evidence for the commonwealth was that the defendant had bought clothes amounting to \$21.55 of one Mitchelman, who called at the defendant's house by appointment for his pay; that some discussion arose about the bill, and that the defendant went up stairs, brought down the clothes, placed them on a chair and put \$20 on a table, and told Mitchelman that he could have the money or the clothes; that Mitchelman took the money, and put it in his pocket, and told the defendant he owed him \$1.55, whereupon the defendant demanded his money back, and, on Mitchelman refusing, attacked him, threw him on the floor, and choked him, until Mitchelman gave him a pocket-book containing \$29. The defendant's counsel denied the receiving of the pocket-book, and said that he could show that the assault was justifiable under the circumstances of the case, as the defendant believed that he had a right to recover his own money by force, if necessary. The presiding justice stated that he should be obliged to rule that the defendant would not be justified in assaulting Mitchelman to get his own money, and that he should rule as follows: "If the jury are satisfied that the defendant choked and otherwise assaulted Mitchelman, they would be warranted in finding the defendant guilty, although the sole motive of the defendant was by this violence to get from Mitchelman by force money which the defendant honestly believed to be his own." Upon this the defendant saved his exceptions, and declined to introduce evidence. The jury were instructed as stated, and found the defendant guilty.

On the evidence for the commonwealth, it appeared, or, at the lowest, the jury might have found, that the defendant offered the \$20 to Mitchelman only on condition that Mitchelman should accept that sum as full payment of his disputed bill, and that Mitchelman took the money, and at the same moment, or just afterwards, as part of the same transaction, repudiated the condition. If this was the case, since Mitchelman, of course, whatever the sum due him, had no

right to that particular money except on the conditions on which it was offered (*Com. v. Stebbins*, 8 Gray, 492), he took the money wrongfully from the possession of the defendant; or the jury might have found that he did, whether the true view be that the defendant did not give up possession, or that it was obtained from him by Mitchelman's fraud, (*Com. v. Devlin*, 141 Mass. 423, 431, 6 N. E. 64; *Chiffer's Case*, T. Raym. 275, 276; *Reg. v. Thompson*, Leigh & C. 225; *Reg. v. Slowly*, 12 Cox, Crim. Cas. 269; *Reg. v. Rodway*, 9 Car. & P. 784; *Rex v. Williams*, 6 Car. & P. 390; 2 East, P. C. c. 16, §§ 110-113.) See *Reg. v. Cohen*, 2 Denison, Cr. Cas. 249, and cases *infra*. The defendant made a demand, if that was necessary,—which we do not imply,—before using force. *Green v. Goddard*, 2 Salk. 641; *Polkinhorn v. Wright*, 8 Q. B. (N. S.) 197; *Com. v. Clark*, 2 Metc. (Mass.) 23, 25; and cases *infra*. It is settled by ancient and modern authority that under such circumstances a man may defend or regain his momentarily interrupted possession by the use of reasonable force, short of wounding, or the employment of a dangerous weapon. *Com. v. Lynn*, 123 Mass. 218; *Com. v. Kennard*, 8 Pick. 133; *Anderson v. State*, 6 Baxt. 608; *State v. Elliot*, 11 N. H. 540, 545; *Rex v. Milton*, Moody & M. 107; Y. B. 9 Edw. IV. 28, pl. 42; 19 Hen. VI. 31, pl. 59; 21 Hen. VI. 27, pl. 9. See *Seaman v. Cuppledick*, Owen, 150; *Taylor v. Markham*, Cro. Jac. 224, Yelv. 157, 1 Brown. & G. 215; *Shingleton v. Smith*, Lutw. 1481, 1483; 2 Inst. 316; *Finch, Law*, 203; 2 Hawk. P. C. c. 60, § 23; 3 Bl. Comm. 121. To this extent the right to protect one's possession has been regarded as an extension of the right to protect one's person, with which it is generally mentioned. *Baldwin v. Hayden*, 6 Conn. 453; Y. B. 19 Hen. VI. 31, pl. 59; *Rogers v. Spence*, 13 Mees. & W. 571, 581; 2 Hawk. P. C. c. 60, § 23; 3 Bl. Comm. 120, 131.

We need not consider whether this explanation is quite adequate. There are weighty decisions which go further than those above cited, and which hardly can stand on the right of self-defense, but involve other considerations of policy. It has been held that even where a considerable time had elapsed between the wrongful taking of the defendant's property and the assault, the defendant had a right to regain possession by reasonable force, after demand upon the third person in possession, in like manner as he might have protected it without civil liability. Whatever the true rule may be, probably there is no difference in this respect between the civil and the criminal law. *Blades v. Higgs*, 10 C. B. (N. S.) 713, 12 C. B. (N. S.) 501, 13 C. B. (N. S.) 844, 11 H. L. Cas. 621; *Com. v. McCue*, 16 Gray, 226, 227. The principle has been extended to a case where the defendant had yielded possession to the person assaulted, through the fraud of the latter. *Hodgeden v. Hubbard*, 18 Vt. 504, 46 Am. Dec. 167. See *Johnson v. Perry*, 56 Vt. 703, 48 Am. Rep. 826. On the other hand, a distinction has been taken between the right to

maintain possession and the right to regain it from another who is peaceably established in it, although the possession of the latter is wrongful. *Bobb v. Bosworth*, Litt. Sel. Cas. 81. See *Barnes v. Martin*, 15 Wis. 240, 82 Am. Dec. 670; *Andre v. Johnson*, 6 Blackf. 375; *Davis v. Whitridge*, 2 Strob. 232; 3 Bl. Comm. 4. It is unnecessary to decide whether in this case, if Mitchelman had taken the money with a fraudulent intent, but had not repudiated the condition until afterwards, the defendant would have had any other remedy than to hold him to his bargain, if he could, even if he knew that Mitchelman still had the identical money upon his person. If the force used by the defendant was excessive, the jury would have been warranted in finding him guilty. Whether it was excessive or not was a question for them; the judge could not rule that it was not, as matter of law. *Com. v. Clark*, 2 Metc. (Mass.) 23. Therefore the instruction given to them, taken only literally, was correct. But the preliminary statement went further, and was erroneous; and, coupling that statement with the defendant's offer of proof, and his course after the rulings, we think it fair to assume that the instruction was not understood to be limited, or indeed to be directed, to the case of excessive force, which, so far as appears, had not been mentioned, but that it was intended and understood to mean that any assault to regain his own money would warrant finding the defendant guilty. Therefore the exceptions must be sustained.

It will be seen that our decision is irrespective of the defendant's belief as to what he had a right to do. If the charge of robbery had been persisted in, and the difficulties which we have stated could have been got over, we might have had to consider cases like *Reg. v. Boden*, 1 Car. & K. 395, 397; *Reg. v. Hemmings*, 4 Fost. & F. 50; *State v. Hollyway*, 41 Iowa, 200, 20 Am. Rep. 586. Compare *Com. v. Stebbins*, 8 Gray, 492; *Com. v. McDuffy*, 126 Mass. 467. There is no question here of the effect of a reasonable but mistaken belief with regard to the facts. *State v. Nash*, 88 N. C. 618. The facts were as the defendant believed them to be.

Exceptions sustained.

(To the same effect are *Hopkins v. Dickson*, 59 N. H. 235; *State v. Elliot*, 11 N. H. 540; *Johnson v. Perry*, 56 Vt. 703, 48 Am. Rep. 826; *Hamilton v. Arnold*, 116 Mich. 684, 75 N. W. 133; *Heminway v. Heminway*, 58 Conn. 443, 19 Atl. 766; *Winter v. Atkinson*, 92 Ill. App. 162; cf. *Barr v. Post*, 56 Neb. 698, 77 N. W. 123; *Mills v. Wooters*, 59 Ill. 234. But some cases are to the contrary, holding that chattels may be retaken from another peaceably, but not by the use of force against his person. *Sabre v. Mott* [C. C.] 88 Fed. 780; *Hendrix v. State*, 50 Ala. 148; *Street v. Sinclair*, 71 Ala. 110; cf. *Madden v. Brown*, 8 App. Div. 454, 40 N. Y. Supp. 714. All the cases agree, however, that there would be a civil liability for a retaking by excessive force, and a criminal liability if a breach of the peace were caused.)

(108 Tenn. 242, 66 S. W. 1128.)

DANIEL v. GILES.

(Supreme Court of Tennessee. December 14, 1901.)

**1. WORDS ALONE DO NOT JUSTIFY AN ASSAULT—WHEN EVIDENCE OF THEM WILL MITIGATE DAMAGES.**

Although any provocation calculated to arouse the passions of a reasonable man, if offered at the time of an assault, or so recently as to be a part of the *res gestæ*, will be considered in mitigation of damages, no words or insults can actually justify an assault.

**2. SAME—INSTRUCTIONS.**

An instruction in an action for assault that, if the jury believed that defendant assaulted plaintiff because of insults, and not because he believed plaintiff was about to assault him, plaintiff would be entitled to recover just such damages as defendant had inflicted upon him, and that, if they found for plaintiff, he would be entitled to recover for mental and physical suffering, loss of time, etc., was erroneous, in that it eliminated the consideration of provocation as an element in mitigation of damages.

Appeal from Circuit Court, Montgomery County; B. D. Bell, Judge.

Action by Tim Giles, Jr., against W. M. Daniel, Jr. From a judgment in favor of plaintiff, defendant appeals. Reversed.

McALISTER, J. Plaintiff below brought this suit to recover damages for an assault and battery inflicted upon him by the defendant, Daniel. The trial resulted in a verdict and judgment against the defendant for \$500. Daniel appealed, and has assigned errors. The court properly charged the jury that no words or insults or opprobrious epithets would justify an assault. It is well settled, however, that any provocation calculated to heat the blood or arouse the passions of a reasonable man, if offered at the time of the assault, or so recently as to become a part of the *res gestæ*, is admissible in evidence, and must be considered by the jury in mitigation of damages. *Jacaway v. Dula*, 7 Yerg. 82, 27 Am. Dec. 492; *Chambers v. Porter*, 5 Cold. 273. It is assigned as error that the charge of the trial judge virtually eliminated from the consideration of the jury in assessing the damages the proof of provocation. On this subject the court charged that: "If the plaintiff, Tim Giles, Jr., was upon the witness stand, and became stubborn or insolent or insulted the defendant, and the defendant, aroused or excited by his conduct and by the insult that he offered or believed he offered, struck and injured the plaintiff when he did not believe that plaintiff was going to assault him, but his action in striking him was based upon the insults alone, and not upon an honest belief that he was about to be assaulted by him, then the plaintiff would be entitled to recover just such damages as the defendant inflicted upon

him. "No man has a right to assault another except in necessary self-defense; and, if the plaintiff was assaulted by the defendant, and it was not in necessary self-defense, or upon his belief founded upon reasonable grounds that he was going to be assaulted, the plaintiff should recover just such damages as he has sustained." The court then proceeds to instruct the jury that if they find for the plaintiff under the charge he would be entitled to recover for mental and physical suffering, loss of time, medical expenses, etc. The court failed to instruct the jury that any insulting language or provocation offered by the plaintiff at the time of the assault should be considered in mitigation of damages. On the contrary, the consideration of the provocation for any purpose is entirely excluded by the court in his hypothetical statement of facts, and the jury were instructed that, unless the proof showed the defendant acted in self-defense at the time of the assault, the plaintiff would be entitled to recover just such damages as he had sustained. This is an affirmative error, for which the judgment must be reversed, and the cause remanded.

(Some authorities hold that evidence of immediate provocation may be received to reduce *exemplary damages*, but not to mitigate *actual damages*, while others hold that it may be available as well for the latter purpose. Goldsmith's *Adm'r v. Joy*, 61 Vt. 488, 17 Atl. 1010, 4 L. R. A. 500, 15 Am. St. Rep. 923 [collecting the cases on both sides of this question]; *Osler v. Walton*, 67 N. J. Law, 63, 50 Atl. 590; *Donnelly v. Harris*, 41 Ill. 126; *Willey v. Carpenter*, 64 Vt. 212, 23 Atl. 630, 15 L. R. A. 853; *Avery v. Ray*, 1 Mass. 12; *Lee v. Woolsey*, 19 Johns. 319, 10 Am. Dec. 230; *Kiff v. Youmans*, 86 N. Y. 324, 40 Am. Rep. 543; *Genung v. Baldwin*, 77 App. Div. 584, 79 N. Y. Supp. 569; *Norris v. Casel*, 90 Ind. 143; *Johnson v. McKee*, 27 Mich. 471; *Goucher v. Jamieson*, 124 Mich. 21, 82 N. W. 663; *Hendle v. Geiler* [Del. Super.] 50 Atl. 632; *Rochester v. Anderson*, 1 Bibb, 428; *Cushman v. Ryan*, 1 Story, 100, Fed. Cas. No. 3,515; cf. *Shipley v. Edwards*, 87 Iowa, 310, 54 N. W. 151. Mere words, however abusive they may be, cannot justify an assault. *Id.*; *Murray v. Boyne*, 42 Mo. 472; *Irlbeck v. Bierl* [Iowa] 67 N. W. 400; *Crosby v. Humphreys* [Minn.] 60 N. W. 843; *Sorgenfrei v. Schroeder*, 75 Ill. 397.)

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(147 Mass. 580, 18 N. E. 465.)

DUPEE v. LENTINE.

(Supreme Judicial Court of Massachusetts. Suffolk. November 15, 1888.)

ASSAULT AND BATTERY—PROVOCATION IN MITIGATION—INSULTS.

In an action for damages for assault and battery, evidence that three hours before the alleged assault plaintiff insulted defendant's wife, and that defendant only learned of it ten minutes before the assault, is inadmissible, as not being a provocation occurring at the time of the assault, and constituting no part of the transaction.

Exceptions from Superior Court, Suffolk County; Albert Mason, Judge.

Tort to recover damages for an assault and battery. At the trial in the superior court the defendant offered to show that the plaintiff indecently insulted defendant's wife at 4 o'clock p. m., at defendant's store, on the day of the assault, while defendant was absent; and that defendant was informed of the insult to his wife after his return, and only 10 minutes before the assault, which took place about 7 p. m. The court excluded the evidence, the jury returned a verdict of \$400 for the plaintiff, and the defendant excepted.

**PER CURIAM.** It is the settled rule in this commonwealth that, in an action for an assault and battery, previous provocation is not admissible in mitigation of damages. Provocation cannot be shown unless it is so recent and immediate as to form part of the transaction. In other words, to be admissible, it must be provocation happening at the time of the assault. *Mowry v. Smith*, 9 Allen, 67; *Tyson v. Booth*, 100 Mass. 258; *Bonino v. Caledonio*, 144 Mass. 299, 11 N. E. 98. In the case at bar, the court, therefore, rightly rejected the evidence offered by the defendant to show provocation by the previous act of the plaintiff in insulting the defendant's wife. It was not a provocation occurring at the time of the assault, and formed no part of the transaction.

Exceptions overruled.

(See, to the same effect, *Collins v. Todd*, 17 Mo. 537; *Thrall v. Knapp*, 17 Iowa, 468; *Coxe v. Whitney*, 9 Mo. 531; *Heiser v. Loomis*, 47 Mich. 16, 10 N. W. 60; *Suggs v. Anderson*, 12 Ga. 461.)

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## — B. Rightful expulsion by carrier of passengers.

(43 Ill. 420, 92 Am. Dec. 138.)

ILLINOIS CENT. R. CO. et al. v. WHITTEMORE.

(Supreme Court of Illinois. April Term, 1867.)

### 1. JUSTIFIABLE OR EXCUSABLE ASSAULT—CARRIER—EXPULSION OF PASSENGER.

A rule of a railroad company requiring passengers to surrender their tickets on the trains is a reasonable regulation, and, for a wanton refusal to comply therewith, the company may expel the passenger from the train, using no more force than is necessary for the purpose, and not selecting a dangerous or inconvenient place.

### 2. SAME.

The statute of Illinois forbidding railroad companies to expel passengers from their trains for non-payment of fare, at any place other than a regular station, does not apply to such a case; a refusal to surrender a ticket, for which the requisite fare has been paid, is not the same offense as a refusal to pay fare.

**3. SAME—REASONABLE REGULATION—QUESTION OF LAW.**

The question whether a regulation of a railroad company requiring passengers to surrender their tickets is reasonable is for the court, either with or without testimony on the subject; to submit it to the jury is error.

Appeal from Circuit Court, Marshall County; Samuel L. Richmond, Judge.

LAWRENCE, J. This was an action of trespass, brought by Whittemore against the Illinois Central Railroad Company and N. W. Cole, a conductor in the service of the company, for wrongfully expelling the plaintiff from a train. It appears the plaintiff had taken passage from Decatur to El Paso, and had procured the necessary ticket. After the train passed Kappa, the station preceding El Paso, the conductor demanded plaintiff's ticket, which the latter refused to surrender without a check. This the conductor refused to give, and, after some controversy with the plaintiff, stopped the train, and, with the aid of a brakeman, expelled the plaintiff. There is considerable evidence in the record given for the purpose of showing that, even admitting the right of the defendants to expel the plaintiff, an unnecessary and wanton degree of violence was used, from which the plaintiff received a permanent and severe injury. As, however, the case must be submitted to another jury, we forbear from any comments on this portion of it. The jury gave the plaintiff a verdict for \$3,125, for which the court rendered judgment, and the defendants appealed. In sustaining a demurrer to the fourth plea, and in giving the instructions, the circuit court held that, although the rules of the road required the conductor to take up the plaintiff's ticket, and notwithstanding he may have refused to surrender it when demanded, the defendants had no right to expel him from the cars, except at a regular station. In support of this position, it is urged by counsel for appellee that the refusal to surrender the ticket was merely equivalent to a refusal to pay the fare, and that the statutory prohibition against the expulsion of passengers for this cause, except at a regular station, should be applied to cases like the present. We held in the case of *Railroad v. Flagg*, (decided at the January term, 1867, 43 Ill. 364, 92 Am. Dec. 133) that the neglect to buy a ticket before entering the train, when required by the rules of the road, was the same thing, in substance, as the refusal to pay the fare, and justified an expulsion only at a regular station. But the refusal to surrender a ticket, for which the requisite fare has already been paid, is certainly not the same thing as refusal to pay the fare. It may be no worse offense against the rights of the railroad company than the refusal to pay the fare, but it is not the same offense. Perhaps there was no good reason why the legislature should have forbidden railways to expel a passenger only at a regular station for the non-payment

of fare, and have left them at liberty to expel one at any other point, for the disregard of any other reasonable rule. But it has done so, and it is our duty to leave the law as the legislature thought proper to establish it. What, then, is the right of a railway company in reference to its passengers? Clearly, to require of them the observance of all such reasonable rules as tend to promote the comfort and convenience of the passengers, to preserve good order and propriety of behavior, to secure the safety of the train, and to enable the company to conduct its business as a common carrier, with advantage to the public and to itself. So long as such reasonable rules are observed by a passenger, the company is bound to carry him, but, if they are wantonly disregarded, that obligation ceases, and the company may at once expel him from the train, using no more force than may be necessary for that purpose, and not selecting a dangerous or inconvenient place. This is a common-law right, arising from the nature of their contract and occupation as common carriers, and, as already remarked, it has been restricted by the legislature only in cases where the offense consists in non-payment of fare. *Railroad Co. v. Parks*, 18 Ill. 460, 68 Am. Dec. 562; *Hilliard v. Goold*, 34 N. H. 230, 66 Am. Dec. 765; *Cheney v. Railroad Co.*, 11 Metc. 121, 45 Am. Dec. 190. If, then, the regulation requiring passengers to surrender their tickets was a reasonable one, the ruling of the court below on this point was erroneous.

That the rule is a reasonable one really admits of no controversy. It was shown by witnesses on the trial, and must be apparent to any one, that the company must have the right to require the surrender of tickets, in order to guard itself against imposition and fraud, and to preserve the requisite method and accuracy in the management of its passenger department. The circuit court left it to the jury to say whether the rule was reasonable. This was error. It was proper to admit testimony, as was done; but, either with or without this testimony, it was for the court to say whether the regulation was reasonable, and therefore obligatory upon the passenger. The necessity of holding this to be a question of law, and therefore within the province of the court to settle, is apparent from the consideration that it is only by so holding that fixed and permanent regulations can be established. If this question is to be left to juries, one rule would be applied by them to-day and another to-morrow. In one trial a railway would be held liable, and in another, presenting the same question, not liable. Neither the companies nor passengers would know their rights or their obligations. A fixed system for the control of the vast interests connected with railways would be impossible, while such a system is essential equally to the roads and to the public. A similar view has recently been taken of this question in the case of *Vedder v. Fellows*, 20 N. Y. 126. The judgment must be reversed; but if it appears, upon an-

other trial, that unnecessary violence was used, the defendants must respond in damages.

Judgment reversed.

(These rules are well sustained: [1] A passenger may be expelled from the train by reasonable force [a] for refusing to exhibit his ticket when required [*Hibbard v. New York & E. R. Co.*, 15 N. Y. 455]; [b] for refusal to pay fare when he has no ticket, or only a worthless or expired ticket, etc. [*McGarry v. Holyoke St. R. Co.*, 182 Mass. 123, 65 N. E. 45; *Bradshaw v. South Boston R. Co.*, 135 Mass. 407, 46 Am. Rep. 481; *State v. Gould*, 53 Me. 279; *Jerome v. Smith*, 48 Vt. 230, 21 Am. Rep. 125; *Monnier v. New York Cent. & H. R. R. Co.*, 175 N. Y. 281, 67 N. E. 569, 62 L. R. A. 357; *Jardine v. Cornell*, 50 N. J. Law, 485, 14 Atl. 590; *Railroad Co. v. Skillman*, 39 Ohio St. 444; *United Railways & Electric Co. v. Hardesty*, 94 Md. 661, 51 Atl. 406, 57 L. R. A. 275; *Everett v. Chicago, R. I. & P. R. Co.*, 69 Iowa, 15, 28 N. W. 410, 58 Am. Rep. 207]; [c] or for violation of any reasonable rules of the company [*Monnier v. New York Cent. & H. R. R. Co.*, 175 N. Y. 281, 67 N. E. 569, 62 L. R. A. 357]. [2] Whether the rules are reasonable or not is a question of law for the court, and not of fact for the jury, when the facts in the case are undisputed. *Avery v. New York Cent. & H. R. R. Co.*, 121 N. Y. 31, 24 N. E. 20; *Pittsburgh, C. & St. L. R. Co. v. Lyon*, 123 Pa. 140, 16 Atl. 607, 2 L. R. A. 489, 10 Am. St. Rep. 517. [3] Unless a statute has changed the common-law rule [and this has been done in a number of the states], the person expelled need not be put off at a station or regular stopping place, but may be put off at any place which will not expose him to serious injury or danger. *Wyman v. Northern Pac. R. Co.*, 34 Minn. 210, 25 N. W. 349; *Railroad Co. v. Skillman*, 39 Ohio St. 444; *Loomis v. Jewett*, 35 Hun, 313; *Stephen v. Smith*, 29 Vt. 160. [4] If excessive force be used in expulsion, or if the forcible expulsion be wholly wrongful, the passenger may recover for assault and battery. *Philadelphia, W. & B. R. Co. v. Rice*, 64 Md. 63, 21 Atl. 97; *New York, L. E. & W. R. Co. v. Haring*, 47 N. J. Law, 137, 54 Am. Rep. 123; *Chicago, St. L. & P. R. Co. v. Bills*, 104 Ind. 13, 3 N. E. 611. [5] A passenger may also resist by force an unlawful expulsion or one that is dangerous to his life or bodily safety, as, e. g., when the train is in motion. *English v. Delaware & H. Canal Co.*, 66 N. Y. 455, 23 Am. Rep. 69; *New York, L. E. & W. R. Co. v. Winter's Adm'r*, 143 U. S. 60, 12 Sup. Ct. 356, 36 L. Ed. 71. [6] It is a general rule that an action is maintainable against a corporation for assault and battery. *Brokaw v. New Jersey R. & Transp. Co.*, 32 N. J. Law, 328, 90 Am. Dec. 659; *Dwinelle v. New York Cent. & H. R. R. Co.*, 120 N. Y. 117, 24 N. E. 319, 8 L. R. A. 224, 17 Am. St. Rep. 611.)

## — C. Discipline of children, pupils, etc.

(53 Conn. 481, 2 Atl. 841.)

**SHEEHAN v. STURGES.**

(Supreme Court of Errors of Connecticut. November 24, 1885.)

### 1. JUSTIFIABLE OR EXCUSABLE ASSAULT—SCHOOLS—PUNISHMENT OF PUPIL.

A teacher may inflict corporal punishment on a pupil, if necessary to enforce compliance by the pupil with proper rules for the good conduct and order of the school; but he must exercise sound discretion and judgment, and the punishment should be adapted, not only to the offense, but to the offender.

**2. SAME—ACTION FOR ASSAULT AND BATTERY—QUESTION OF FACT.**

In an action against a teacher for an assault and battery in whipping a pupil, the extent and reasonableness of the punishment is purely a question of fact.

**3. SAME—EVIDENCE.**

In such an action, evidence of habitual misconduct of the pupil prior to the punishment is admissible on behalf of defendant.

Appeal from Superior Court, Fairfield County; Beardsley, Judge. Action for assault and battery. Judgment was rendered for defendant. Plaintiff appealed from the judgment.

GRANGER, J. This is a complaint for an assault and battery. The defense is that the plaintiff was at the time a pupil in a school kept by the defendant; that he willfully violated the reasonable rules of the school, and disobeyed the reasonable commands of the defendant as his teacher; and that for this misconduct the defendant, as such teacher, whipped him in a reasonable manner. The sole controversy upon the trial was as to the reasonableness of the punishment inflicted. The court found that "such whipping was not unreasonable or excessive, and was fully justified by the plaintiff's misconduct at that time." The extent and reasonableness of the punishment administered by a teacher to his pupil is purely a question of fact. This is too well settled to make the citation of authorities necessary. The finding of the court, therefore, settles the question as to this, unless the court acted upon improper evidence.

The plaintiff testified as a witness in his own behalf, and on his cross-examination the defendant, against the objection of the plaintiff's counsel, was allowed to ask him whether, on two former occasions, both of them more than a week before the whipping in question, he had not assaulted the teacher while he was chastising him. And the defendant afterwards in his testimony in his own behalf was allowed, against the objection of the plaintiff, to state that the plaintiff's conduct in school was habitually bad, and that on two former occasions, one of them about two weeks and the other seven or eight days before the whipping in question the plaintiff had assaulted him while he was chastising him. The defendant was also allowed, on the plaintiff's cross-examination, against objection, to inquire of him whether he had not, seven or eight days before the whipping in question, put stones in his pocket, and declared that he was going to attack the teacher with them. The plaintiff, in answer to the inquiry, denied that he had done so; and the defendant, against the plaintiff's objection, was allowed to show by a witness that the plaintiff had so done. The defendant did not inform the plaintiff, at the time of the whipping, that he was punishing him for his past and habitual misconduct. We think that the court committed no error in admitting the inquiries and evidence. The right of the school-master to require obedience to reasonable rules and a proper submission to his authority, and to in-

flit corporal punishment for disobedience, is well settled. It is said in the *Encyclopedia of Education*, edited by Kiddle & Schem, page 189, that "the school codes of the United States are generally silent in regard to the right of teachers to inflict corporal punishment, and there are numerous judicial decisions in favor of this right. By English and American law a parent may correct his child in a reasonable manner, and the teacher is in *loco parentis*;" citing 2 Kent, Comm. 203; 1 Bl. Comm. 453; Comm. v. Randall, 4 Gray, 36; State v. Pendergrass, 19 N. C. 365, 31 Am. Dec. 416; Stevens v. Fassett, 27 Me. 280; Lander v. Seaver, 32 Vt. 123, 76 Am. Dec. 156.

As incident to this relationship, it is the right of the teacher, in the absence of rules established by the school board or other proper authority, to make all necessary and proper rules for the good conduct and order of the school; and it is his duty to see that order is maintained and the rules observed; and if any scholar violates the rules, and disobeys the orders of the teacher, it is the duty of the latter to enforce compliance, and to that end it may be necessary to inflict personal chastisement, as without it he might lose all control of the school. In inflicting such punishment the teacher must exercise sound discretion and judgment, and must adapt it, not only to the offense, but to the offender. Horace Mann, a high authority in the matter of schools, says of corporal punishment: "It should be reserved for baser faults. It is a coarse remedy, and should be employed upon the coarse sins of our animal nature, and, when employed at all, should be administered in strong doses." Of course the teacher, in inflicting such punishment, must not exceed the bounds of moderation. No precise rule can be laid down as to what shall be considered excessive or unreasonable punishment. Reeve, Dom. Rel. 288. Each case must depend upon its own circumstances. In Comm. v. Randall, 4 Gray, 36, it is held that "in inflicting corporal punishment a teacher must exercise reasonable judgment and discretion, and be governed as to the mode and severity of the punishment by the nature of the offense, and the age, size, and apparent powers of endurance of the pupil." And we think it equally clear that he should also take into consideration the mental and moral qualities of the pupil; and, as indicative of these, his general behavior in school and his attitude towards his teacher become proper subjects of consideration. We think, therefore, that the court acted properly in admitting evidence of the prior and habitual misconduct of the plaintiff, and that it was perfectly proper for the defendant, in chastising him, to consider, not merely the immediate offense which had called for the punishment, but the past offenses that aggravated the present one, and showed the plaintiff to have been habitually refractory and disobedient. Nor was it necessary that the teacher should, at the time of inflicting the punishment, remind the pupil of his past and accumulating offenses. The pupil

knew them well enough, without having them brought freshly to his notice. There is no error.

The other judges concurred.

(See also as to teachers, *Patterson v. Nutter*, 78 Me. 509, 7 Atl. 273, 57 Am. Rep. 818; *Van Vactor v. State*, 113 Ind. 276, 15 N. E. 341, 3 Am. St. Rep. 645; *State v. Mizner*, 45 Iowa, 248, 24 Am. Rep. 769; *Heritage v. Dodge*, 64 N. H. 297, 9 Atl. 722; *Boyd v. State*, 88 Ala. 169, 7 South. 268, 16 Am. St. Rep. 31; *Danenboffer v. State*, 69 Ind. 295, 35 Am. Rep. 216; *Id.*, 79 Ind. 75; *Cleary v. Booth* [1893] 1 Q. B. 465. It has been held in some states that a *civil action* will not lie by a child against its parent for excessive severity in punishment, but that the parent can only be proceeded against *criminally* [*McKelvey v. McKelvey* (Tenn.) 77 S. W. 664; *Hewelett v. George*, 68 Miss. 703, 9 South. 885, 13 L. R. A. 682]; but a civil action against a *stepmother* has been sustained [*Treschman v. Treschman*, 28 Ind. App. 206, 61 N. E. 961]; and against an *aunt* acting *in loco parentis* [*Clasen v. Pruhs* (Neb.) 95 N. W. 640]. As to the *criminal* liability of parents, or persons *in loco parentis*, see *Id.*; *Dean v. State*, 89 Ala. 46, 8 South. 38; *State v. Jones*, 95 N. C. 588, 59 Am. Rep. 282; *Hinkle v. State*, 127 Ind. 490, 26 N. E. 777; *Fletcher v. People*, 52 Ill. 395.)

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## — D. Act of public officer in performance of official duty.

(20 Barb. 16.)

### HAGER et al. v. DANFORTH.

(Supreme Court of New York. Albany, General Term. September 4, 1854.)

#### JUSTIFIABLE OR EXCUSABLE ASSAULT—SERVICE OF PROCESS.

Defendant went to the house of plaintiffs, who were husband and wife, to serve on the husband, who was in the house, a subpoena in a suit then pending, and, finding a door open, entered peaceably; but the wife ordered him out, and resisted him in attempting to proceed to the stairs, in search for the husband, although he told her he had a subpoena to serve. *Held*, that defendant was in the house under a legal license, and it was not his duty to leave when ordered to do so by the wife; and that he had a right to use such force as was necessary to overcome her unlawful resistance to the service of the subpoena, and was liable only for any excess of violence used by him.

#### Appeal from Special Term.

Action by Daniel J. Hager and wife for an assault and battery alleged to have been committed upon the wife by defendant. It appeared that a previous action had been brought before a justice of the peace by Danforth, the defendant in this action, against the plaintiff Daniel J. Hager; that on the day on which that action was to be tried, Danforth, having procured from the justice a subpoena for Hager as a witness therein, went to Hager's house for the purpose of serving it; that he found a door open, and entered, but was met and resisted by Mrs. Hager, who ordered him out of the house; that Danforth replied to her that he had a subpoena to serve on Hager, and, Hager being upstairs at the time, Danforth at-

tempted to force his way to the stairs, against the resistance of Mrs. Hager, and in doing so choked her and threw her back against the catch of a door, slightly bruising her; and that thereafter Hager came downstairs, and Danforth then served the subpœna upon him, and soon after left the house. The judge charged the jury that a license to enter the house for the purpose of serving the subpœna was implied, but that "after Mrs. Hager had ordered the defendant out, the subpœna was not a justification or protection to him in pressing forward, and, when resisted in his advance, using force to serve it." To this part of the charge defendant excepted. The jury found a verdict for plaintiffs for \$250. Defendant moved upon a case for a new trial, which motion was denied, and from the order denying a new trial defendant appealed to the general term.

Before WRIGHT, HARRIS, and WATSON, Justices.

HARRIS, J. The defendant went to the plaintiffs' house with process which he was authorized by law to serve. 2 Rev. St. p. 240, § 82. The person upon whom he was to make the service was in the house. These facts amounted to a legal license, and having found the door open, and entered peaceably, the defendant was lawfully there. Deriving his authority to be there from the law, and not from the consent of the plaintiffs, he was under no obligation to obey Mrs. Hager when she ordered him to leave. Not having conferred upon him his license, she had no power to revoke it. He was as rightfully there after he had been directed to leave as before. I know of no duty which bound him to desist from the execution of the lawful purpose which had brought him there. If his taste led him to encounter the vituperation and violence of such a woman as he met there, it was his right to do so. To the extent, therefore, that the force used by the defendant was necessary to overcome the unlawful resistance he met in the service of the subpœna, it was lawful. Mrs. Hager was the wrong-doer, and not the defendant. If he used more force than was necessary to enable him to accomplish his purpose, to that extent he is liable as a wrong-doer. The jury were led to understand, upon the trial, that, after Mrs. Hager had ordered the defendant out, the subpœna furnished him no justification or protection. In effect, they were instructed that, by remaining after having been ordered to leave, the defendant became a trespasser. In this they were misled, and the result was a verdict against the defendant to an amount entirely unwarranted by the evidence. The jury ought to have been told that, inasmuch as the defendant had entered the house in a peaceable manner, under a license given him by law, he had a right to remain there until he had effected the service of the subpœna; that Mrs. Hager, by resisting the defendant in making such service, was herself guilty of

an unlawful act; and that the defendant was justified, notwithstanding such resistance, in using all the force necessary to enable him to serve the subpoena; and that he was only liable for any excess of violence used by him more than was necessary to overcome the resistance with which he met. I am of opinion, therefore, that the order of the special term should be reversed, and that a new trial should be granted, with costs to abide the event.

(Compare *Hull v. Bartlett*, 49 Conn. 64; *Delafoile v. State*, 54 N. J. Law, 381, 24 Atl. 557, 16 L. R. A. 500. An officer may use such force as is necessary in making a lawful arrest. *Shovlin v. Comm.*, 106 Pa. 369. He has no right, however, to break the outer door of a dwelling in the execution of civil process. *Curtis v. Hubbard*, 1 Hill, 336, 4 Hill, 437.

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## FALSE IMPRISONMENT.

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### What constitutes false imprisonment.

(7 Adol. & E. [N. S.] \*742.)

*BIRD v. JONES* (in part).

(Court of Queen's Bench. July 9, 1845.)

#### FALSE IMPRISONMENT—WHAT CONSTITUTES IMPRISONMENT.

Plaintiff, attempting to pass in a particular direction along part of a public highway which had been inclosed by defendant, was obstructed by the latter, who prevented him from proceeding in that direction, but left him at liberty to go in another direction. *Held*, that there was no imprisonment on which plaintiff could maintain an action for false imprisonment.

#### Rule nisi for new trial.

Action of trespass for assault and false imprisonment. At the trial, before Denman, C. J., the jury found a verdict for plaintiff. Defendant obtained a rule nisi for a new trial, on the ground of misdirection, consisting of a statement by the chief justice to the jury at the trial that an imprisonment of plaintiff had taken place before plaintiff assaulted defendant.

COLERIDGE, J. In this case, in which we have unfortunately been unable to agree in our judgment, I am now to pronounce the opinion which I have formed; and I shall be able to do so very briefly, because, having had the opportunity of reading a judgment prepared by my Brother Patteson, and entirely agreeing with it, I may content myself with referring to the statement he has made

in detail of those preliminary points in which we all, I believe, agree, and which bring the case up to that point upon which its decision must certainly turn, and with regard to which our difference exists. This point is whether certain facts, which may be taken as clear upon the evidence, amount to an imprisonment. These facts, stated shortly, and as I understand them, are, in effect, as follows:

A part of a public highway was inclosed, and appropriated for spectators of a boat-race, paying a price for their seats. The plaintiff was desirous of entering this part, and was opposed by the defendant; but, after a struggle, during which a momentary detention of his person took place, he succeeded in climbing over the inclosure. Two policemen were then stationed by the defendant to prevent, and they did prevent, him from passing onwards in the direction in which he declared his wish to go; but he was allowed to remain unmolested where he was, and was at liberty to go, and was told that he was so, in the only other direction by which he could pass. This he refused for some time, and, during that time, remained where he had thus placed himself.

These are the facts, and, setting aside those which do not properly bear on the question now at issue, there will remain these: That the plaintiff, being in a public highway and desirous of passing along it, in a particular direction, is prevented from doing so by the orders of the defendant, and that the defendant's agents for the purpose are policemen, from whom, indeed, no unnecessary violence was to be anticipated, or such as they believed unlawful, yet who might be expected to execute such commands as they deemed lawful, with all necessary force, however resisted. But, although thus obstructed, the plaintiff was at liberty to move his person, and go in any other direction, at his free will and pleasure, and no actual force or restraint on his person was used, unless the obstruction before mentioned amounts to so much. I lay out of consideration the question of right or wrong between these parties. The acts will amount to imprisonment, neither more nor less, from their being wrongful or capable of justification. And I am of opinion that there was no imprisonment. To call it so appears to me to confound partial obstruction and disturbance with total obstruction and detention. A prison may have its boundary, large or narrow, visible and tangible, or, though real, still in the conception only; it may itself be movable or fixed; but a boundary it must have, and that boundary the party imprisoned must be prevented from passing. He must be prevented from leaving that place, within the ambit of which the party imprisoning would confine him, except by prison-breach. Some confusion seems to me to arise from confounding imprisonment of the body with mere loss of freedom. It is one part of the definition of freedom to be able to go whithersoever one pleases. But imprisonment is something more

than the mere loss of this power. It includes the notion of restraint within some limits defined by a will or power exterior to our own.

In Com. Dig. "Imprisonment," (G,) it is said: "Every restraint of the liberty of a freeman will be an imprisonment." For this the authorities cited are 2 Inst. 482; Herbert and Stroud's Case, Cro. Car. 210. But, when these are referred to, it will be seen that nothing was intended at all inconsistent with what I have ventured to lay down above. In both books, the object was to point out that a prison was not necessarily what is commonly so called,—a place locally defined and appointed for the reception of prisoners. Lord Coke is commenting on the statute of Westminster 2d, (1 St. 13 Edw. II. c. 48,) "in prisona," and says: "Every restraint of the liberty of a freeman is an imprisonment, although he be not within the walls of any common prison."

On a case of this sort, which, if there be difficulty in it, is at least purely elementary, it is not easy nor necessary to enlarge; and I am unwilling to put any extreme case hypothetically; but I wish to meet one suggestion, which has been put as avoiding one of the difficulties which cases of this sort might seem to suggest. If it be said that to hold the present case to amount to an imprisonment would turn every obstruction of the exercise of a right of way into an imprisonment, the answer is that there must be something like personal menace or force accompanying the act of obstruction, and that, with this, it will amount to imprisonment. I apprehend that is not so. If, in the course of a night, both ends of a street were walled up, and there was no egress from the house but into the street, I should have no difficulty in saying that the inhabitants were thereby imprisoned; but if only one end were walled up, and an armed force stationed outside to prevent any scaling of the wall or passage that way, I should feel equally clear that there was no imprisonment. If there were, the street would obviously be the prison; and yet, as obviously, none would be confined to it.

According to my view of the case, the rule should be absolute for a new trial.

WILLIAMS, J. A part of Hammersmith bridge, which is generally used as a public footway, was appropriated for seats to view a regatta on the river, and separated for that purpose from the carriage-way by a temporary fence. The plaintiff insisted upon passing along the part so appropriated, and attempted to climb over the fence. The defendant (clerk of the bridge company) pulled him back, but the plaintiff succeeded in climbing over the fence. The defendant then stationed two policemen to prevent, and they did prevent, the plaintiff from proceeding forward along the footway in the direction he wished to go. The plaintiff, however, was at

the same time told that he might go back into the carriage-way, and proceed to the other side of the bridge, if he pleased. The plaintiff refused to do so, and remained where he was so obstructed, about half an hour. And, if a partial restraint of the will be sufficient to constitute an imprisonment, such undoubtedly took place. He wished to go in a particular direction, and was prevented; but, at the same time, another course was open to him.

About the meaning of the word "imprisonment," and the definitions of it usually given, there is so little doubt that any difference of opinion is scarcely possible. Certainly, so far as I am aware, none such exists upon the present occasion. The difficulty, whatever it may be, arises when the general rule is applied to the facts of a particular case. "Every confinement of the person," according to Blackstone, (3 Bl. Comm. 127,) "is an imprisonment, whether it be in a common prison, or in a private house, or in the stocks, or even by forcibly detaining one in the public streets," which, perhaps, may seem to imply the application of force more than is really necessary to make an imprisonment. Lord Coke, in his second Institute, (2 Inst. 589,) speaks of "a prison in law" and "a prison in deed;" so that there may be a constructive, as well as an actual, imprisonment; and therefore it may be admitted that personal violence need not be used in order to amount to it. "If the bailiff," as the case is put in Bull. N. P. 62, "who has a process against one, says to him, 'You are my prisoner; I have a writ against you,' upon which he submits, turns back, or goes with him, though the bailiff never touched him, yet it is an arrest, because he submitted to the process." So, if a person should direct a constable to take another in custody, and that person should be told by the constable to go with him, and the orders are obeyed, and they walk together in the direction pointed out by the constable, that is constructively an imprisonment, though no actual violence be used. In such cases, however, though little may be said, much is meant and perfectly understood. The party addressed in the manner above supposed feels that he has no option, no more power of going in any but the one direction prescribed to him, than if the constable or bailiff had actually hold of him. No return or deviation from the course prescribed is open to him. And it is that entire restraint upon the will which, I apprehend, constitutes the imprisonment. In the passage cited from Buller's *Nisi Prius* it is remarked that if the party addressed by the bailiff, instead of complying, had run away, it could be no arrest, unless the bailiff actually laid hold of him, and for obvious reasons. Suppose (and the supposition is perhaps objectionable, as only putting the case before us over again) any person to erect an obstruction across a public passage in a town, and another, who had a right of passage, to be refused permission by the party obstructing, and, after some delay, to be compelled to re-

turn and take another and circuitous route to his place of destination. I do not think that, during such detention, such person was under imprisonment, or could maintain an action for false imprisonment, whatever other remedy might be open to him. I am desirous only to illustrate my meaning, and explain the reason why I consider the imprisonment in this case not to be complete. The reason, shortly, is that I am aware of no case, nor of any definition, which warrants the supposition of a man being imprisoned during the time that an escape is open to him, if he chooses to avail himself of it.

PATTESON, J. I have no doubt that, in general, if one man compels another to stay in any given place against his will, he imprisons that other just as much as if he locked him up in a room; and I agree that it is not necessary, in order to constitute an imprisonment, that a man's person should be touched. I agree, also, that the compelling a man to go in a given direction against his will may amount to imprisonment. But I cannot bring my mind to the conclusion that, if one man merely obstructs the passage of another in a particular direction, whether by threat of personal violence or otherwise, leaving him at liberty to stay where he is or to go in any other direction if he pleases, he can be said thereby to imprison him. He does him wrong, undoubtedly, if there was a right to pass in that direction, and would be liable to an action on the case for obstructing the passage, or of assault, if, on the party persisting in going in that direction, he touched his person, or so threatened him as to amount to an assault. But imprisonment is, as I apprehend, a total restraint of the liberty of the person, for however short a time, and not a partial obstruction of his will, whatever inconvenience it may bring on him. The quality of the act cannot, however, depend on the right of the opposite party. If it be an imprisonment to prevent a man passing along the public highway, it must be equally so to prevent him passing further along a field into which he has broken by a clear act of trespass.

A case was said to have been tried before Lord Chief Justice Tindal, involving this question; but it appears that the plaintiff in that case was compelled to stay and hear a letter read to him against his will, which was doubtless a total restraint of his liberty while the letter was read. I agree to the definition in Selwyn's *Nisi Prius*, title "Imprisonment:" "False imprisonment is a restraint on the liberty of the person without lawful cause; either by confinement in prison, stocks, house, etc., or even by forcibly detaining the party in the streets against his will." He cites 22 Book Ass. fol. 104, B, pl. 85, per Thorpe, C. J. The word there used is "arrest," which appears to me to include a "detaining," as Mr. Selwyn expresses it, and not to mean merely the preventing a person from

passing. I therefore think that the rule for a new trial ought to be made absolute.

DENMAN, C. J. (dissenting). I have not drawn up a formal judgment in this case, because I hoped to the last that the arguments which my learned brothers would produce in support of their opinion might alter mine. We have freely discussed the matter, both orally and in written communications; but, after hearing what they have advanced, I am compelled to say that my first impression remains. If, as I must believe, it is a wrong one, it may be in some measure accounted for by the circumstances attending the case. A company unlawfully obstructed a public way for their own profit, extorting money from passengers, and hiring policemen to effect this purpose. The plaintiff, wishing to exercise his right of way, is stopped by force, and ordered to move in a direction which he wished not to take. He is told at the same time that a force is at hand ready to compel his submission. That proceeding appears to me equivalent to being pulled by the collar out of one line into another. There is some difficulty, perhaps, in defining "imprisonment" in the abstract, without reference to its illegality; nor is it necessary for me to do so, because I consider these acts as amounting to imprisonment. That word I understand to mean any restraint of the person by force. In Buller's *Nisi Prius* (page 22) it is said: "Every restraint of a man's liberty under the custody of another, either in a jail, house, stocks, or in the street, is in law an imprisonment; and whenever it is done without a proper authority, is false imprisonment, for which the law gives an action; and this is commonly joined to assault and battery, for every imprisonment includes a battery, and every battery an assault." It appears, therefore, that the technical language has received a very large construction, and that there need not be any touching of the person. A locking up would constitute an imprisonment without touching. From the language of Thorpe, C. J., which Mr. Selwyn cites from the Book of Assizes, (22 Book Ass. fol. 104, B, pl. 85,) it appears that, even in very early times, restraint of liberty by force was understood to be the reasonable definition of imprisonment. I had no idea that any person in these times supposed any particular boundary to be necessary to constitute imprisonment, or that the restraint of a man's person from doing what he desires ceases to be an imprisonment because he may find some means of escape. It is said that the party here was at liberty to go in another direction. I am not sure that in fact he was, because the same unlawful power which prevented him from taking one course might, in case of acquiescence, have refused him any other. But this liberty to do something else does not appear to me to affect the question of imprisonment. As long as I am prevented from doing what I have a right to do, of

what importance is it that I am permitted to do something else? How does the imposition of an unlawful condition show that I am not restrained? If I am locked in a room, am I not imprisoned because I might effect my escape through a window, or because I might find an exit dangerous or inconvenient to myself, as by wading through water, or by taking a route so circuitous that my necessary affairs would suffer by delay? It appears to me that this is a total deprivation of liberty with reference to the purpose for which he lawfully wished to employ his liberty; and, being effected by force, it is not the mere obstruction of a way, but a restraint of the person. The case cited as occurring before Lord Chief Justice Tindal, as I understand it, is much in point. He held it an imprisonment where the defendant stopped the plaintiff on his road till he had read a libel to him, yet he did not prevent his escaping in another direction. It is said that, if any damage arises from such obstruction, a special action on the case may be brought. Must I then sue out a new writ, stating that the defendant employed direct force to prevent my going where my business called me, whereby I sustained loss? And, if I do, is it certain that I shall not be told that I have misconceived my remedy, for all flows from the false imprisonment, and that should have been the subject of an action of trespass and assault? For the jury properly found that the whole of the defendant's conduct was continuous; it commenced in illegality; and the plaintiff did right to resist it as an outrageous violation of the liberty of the subject from the very first.

Rule absolute.

(See also *Hildebrand v. McCrum*, 101 Ind. 61 [locking a person in a room]; *Marshall v. Heller*, 55 Wis. 392, 13 N. W. 236 [detaining a person by threats]; *Sorenson v. Dundas*, 50 Wis. 335, 7 N. W. 259 [keeping a man in his own house by fear]; *McNay v. Stratton*, 9 Ill. App. 215 [frightening a man with a revolver so that he does not dare to leave a certain place]; *Mowry v. Chase*, 100 Mass. 79.)

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(9 N. H. 491.)

**PIKE v. HANSON et al. (In part).**

(Superior Court of Judicature of New Hampshire. Strafford. December Term, 1838.)

**1. FALSE IMPRISONMENT—CONSTRUCTIVE FORCE SUFFICIENT.**

Words alone are not sufficient to constitute an imprisonment; there must be a touching of the body, or, what is equivalent, a power of taking immediate possession of the body, and the party's submission thereto.

**2. SAME.**

Thus where a tax officer, being present in the same room with plaintiff, called upon her to pay a tax, which she declined doing until arrested, and he then told her he arrested her, whereupon she yielded and paid the tax, *held*, that this amounted to an arrest and imprisonment, though he

did not lay his hand upon her, and, as there was no lawful authority to collect the tax, that he was liable for assault and false imprisonment.

Trespass for an assault and false imprisonment on the 1st day of July, A. D. 1837. The action was commenced before a justice of the peace. The defendants pleaded severally the general issue. It appeared in evidence that the defendants were selectmen of the town of Madbury for the year 1836; that they assessed a list of taxes upon the inhabitants of said town, among whom was the plaintiff, and committed it to Nathan Brown, collector of said town, for collection. Brown, after having given due notice to the plaintiff, being in a room with her, called upon her to pay the tax, which she declined doing until arrested. He then told her that he arrested her, but did not lay his hand upon her, and thereupon she paid the tax.

Upon this evidence the defendants objected that the action could not be maintained, because there was no assault.

It did not appear that the defendants had been sworn, as directed by the statute of January 4, 1833. A verdict was taken for the plaintiff, subject to the opinion of the court.

WILCOX, J. As the appraisement was made in a manner not authorized by law [the assessors not having taken the oath prescribed by statute that they will make a just and true appraisement of all ratable estate], all the proceedings of the defendants are void, and they are liable as trespassers for the forcible collection of this tax.

But it is contended that in the present case there has been no assault committed and no false imprisonment. Bare words will not make an arrest; there must be an actual touching of the body; or, what is tantamount, a power of taking immediate possession of the body, and the party's submission thereto. *Genner v. Sparks*, 1 Salk. 79; 2 Esp. N. P. 374. Where a bailiff, having a writ against a person, met him on horseback, and said to him, "You are my prisoner," upon which he turned back and submitted, this was held to be a good arrest, though the bailiff never laid hand on him. But if, on the bailiff's saying those words, he had fled, it had been no arrest, unless the bailiff had laid hold of him. *Homer v. Battyn*, Buller's N. P. 62. The same doctrine is held in other cases. *Russen v. Lucas et al.*, 1 C. & P. 153; *Chinn v. Morris*, 2 C. & P. 361; *Pocock v. Moore*, Ryan & Moody, 321; *Strout v. Gooch*, 8 Greenl. 127; *Bissell v. Gold*, 1 Wend. 210, 19 Am. Dec. 480.

Where, upon a magistrate's warrant being shown to the plaintiff, the latter voluntarily and without compulsion attended the constable who had the warrant, to the magistrate, it was held there was no sufficient imprisonment to support an action. *Arrowsmith v. Le Mesurier*, 2 N. R. 211. But in this case there was no declaration

of any arrest, and the warrant was in fact used only as a summons. And if the decision cannot be sustained upon this distinction, it must be regarded as of doubtful authority.

Starkie says that in ordinary practice words are sufficient to constitute an imprisonment, if they impose a restraint upon the person, and the plaintiff is accordingly restrained; for he is not obliged to incur the risk of personal violence and insult by resisting until actual violence be used. 3 Stark. Ev. 1448. This principle is reasonable in itself, and is fully sustained by the authorities above cited. Nor does it seem necessary that there should be any very formal declaration of an arrest. If the officer goes for the purpose of executing his warrant; has the party in his presence and power; if the party so understands it, and in consequence thereof submits; and the officer, in execution of the warrant, takes the party before a magistrate, or receives money or property in discharge of his person—we think it is in law an arrest, although he did not touch any part of the body.

In the case at bar it clearly appears that the plaintiff did not intend to pay the tax, unless compelled by an arrest of her person. The collector was so informed. He then proceeded to enforce the collection of the tax—declared that he arrested her—and she, under that restraint, paid the money. This is a sufficient arrest and imprisonment to sustain the action, and there must therefore be,

Judgment on the verdict.

(See, to the same effect, *Marshall v. Heller*, 55 Wis. 392, 13 N. W. 236; *Great-house v. Summerfield*, 25 Ill. App. 296; *Comer v. Knowles*, 17 Kan. 436, 440; *Callahan v. Searles*, 78 Hun, 238, 28 N. Y. Supp. 904; *Searls v. Viets*, 2 Thomp. & C. 224.)

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(90 N. Y. 77, 43 Am. Rep. 141.)

#### LYNCH v. METROPOLITAN EL. RY. CO.

(Court of Appeals of New York. October 10, 1882.)

#### FALSE IMPRISONMENT—DETENTION OF PASSENGER BY CARRIER.

Plaintiff purchased a ticket for a passage upon defendant's railway, and entered one of its cars, but, before reaching his destination, he lost his ticket. On attempting to pass from the station platform through the gate into the street, he was prohibited by the gate-keeper, and told that he could not pass until he should produce a ticket or pay his fare. He explained that he had paid his fare and lost his ticket, and insisted on passing out, but was pushed back by the gate-keeper; and, on his further insisting on his right to pass, the gate-keeper sent for a police officer, and ordered his arrest, whereupon he was arrested by the officer. *Held*, that the detention of plaintiff by the gate-keeper for the purpose of enforcing payment of fare was illegal; and that defendant, having instructed its gate-keepers not to let passengers pass out until they should either pay their fares or show tickets, was liable to plaintiff for the false imprisonment by the gate-keeper.

Appeal from Supreme Court, General Term, First Department.

Action by Michael Lynch against the Metropolitan Elevated Railway Company for false imprisonment. At the trial the jury found a verdict for plaintiff, and judgment for plaintiff was entered thereon, which was affirmed on appeal to the general term. From the judgment of the general term defendant appealed.

EARL, J. In September, 1878, the plaintiff purchased a ticket for a passage upon defendant's railway from its Forty-Second Street station to its Rector-Street station, and entered one of its cars. Before reaching his destination he lost his ticket, and when he attempted to pass from the station platform through the gate into the street he was prohibited by the gate-keeper, and told that he could not pass until he produced a ticket or paid his fare. He explained that he had paid his fare and lost his ticket, and insisted upon passing out. He was pushed back by the gate-keeper, who refused to let him pass. He expostulated, and insisted upon his right to pass, when the gate-keeper sent for a police officer, and ordered his arrest. He was arrested, and taken to a police station by the police officer, the gate-keeper going along, and making complaint against him. He was locked up in the station-house over night. In the morning the gate-keeper appeared against him, and he was examined before a police magistrate, and discharged. This action was afterwards commenced to recover damages for the false arrest and imprisonment. He recovered a judgment, which has, upon appeal, been affirmed. 24 Hun, 506.

We are of opinion that the trial judge was right in holding, as matter of law, that the plaintiff's arrest and detention were illegal. The defendant had the right to make reasonable rules and regulations for the management of its business and the conduct of its passengers. It could require every passenger before entering one of its cars to produce a ticket, and to produce and deliver up the ticket at the end of his passage, or again pay his fare. *Railroad Co. v. Page*, 22 Barb. 130; *Hibbard v. Railroad Co.*, 15 N. Y. 455; *Vedder v. Fellows*, 20 N. Y. 126; *Townsend v. Railroad Co.*, 56 N. Y. 295, 15 Am. Rep. 419. The defendant had such a regulation, and no complaint can be made of that. But it had no regulation, and could legally have none, that a passenger, before leaving its cars or its premises, should produce a ticket or pay his fare, and, if he did not, that he should then and there be detained and imprisoned until he did so. At most, the plaintiff was a debtor to the defendant for the amount of his fare, and that debt could be enforced against him by the same remedies which any creditor has against his debtor. If the defendant had the right to detain him to enforce payment of the fare for ten minutes, it could detain him for one hour, or a day, or a year, or for any other time, until compliance with its de-

mands. That would be arbitrary imprisonment by a creditor without process or trial, to continue during his will, until his debt should be paid. Even if a reasonable detention may be justified to enable the carrier to inquire into the circumstances, it cannot be to compel payment of fare. The detention here was not to enable the gate-keeper to make any inquiry, but simply to compel payment. He was absolutely informed that he could not pass out without producing a ticket or paying his fare. This is not like the cases to which the learned counsel for defendant has called our attention, where railroad conductors have been held justified in ejecting passengers from cars for refusing to produce tickets or pay their fares. A passenger has no right to ride in a car without payment of his fare, and, if he refuses to pay, the railroad company is not bound to carry him, and may, at a proper place and in a proper manner, remove him from the car; but it could not imprison him in a car until he paid his fare, for the purpose of compelling payment.

These views have the sanction of very high authority. In *Sunbolt v. Alford*, 3 Mees. & W. 248, it was held that an innkeeper could not detain the person of his guest in order to secure payment of his bill. Lord Abinger said: "If an innkeeper has a right to detain the person of his guest for the non-payment of his bill, he has a right to detain him until the bill is paid, which may be for life; so that this defense supposes that by the common law a man who owes a small debt, for which he could not be imprisoned by legal process, may yet be detained by an innkeeper for life. The proposition is monstrous. \* \* \* Where is the law that says a man shall detain another for his debt without process of law?" In *Chilton v. Railway Co.*, 16 Mees. & W. 212, the defendant was organized under an act conferring much broader powers than are possessed by the defendant in this case, and yet it was held that it could not arrest a passenger for refusing to pay a fare which it was entitled to demand. In *Standish v. Steam-Ship Co.*, 111 Mass. 512, 15 Am. Rep. 66, the plaintiff purchased a ticket before going upon the defendant's steam-boat for a passage from Fall River to New York. The defendant's regulation was that the passenger should, upon leaving the boat at the end of his passage, deliver up his ticket or pay his fare. When the plaintiff reached New York he found he had lost his ticket, and when he attempted to leave the boat he was prohibited, and told that he could not pass until he produced a ticket or paid his fare. He was detained two hours, and then, under protest, paid his fare, and was permitted to leave the boat. He sued the company for false imprisonment, and recovered \$50. The trial judge charged the jury that "the law gave the defendant a lien on the baggage of the plaintiff, but not on his person; that they had no right to detain him until he did pay his fare or give up a ticket, or to compel him to pay his fare or give up a ticket, but that, if he knew that he was to give up his ticket before leaving

the boat, the defendant had a right, if he did not give it up or pay his fare, to detain him for a reasonable time to investigate on the spot the circumstances of the case; and if the jury found that the defendant detained him for the purpose of compelling him to pay his fare or to give up his ticket, or detained him for the purpose of investigating his case an unreasonable time, or in an unreasonable way, he was entitled to recover." The plaintiff appealed, alleging for error that the judge erred in charging the jury that the defendant had a right to detain him a reasonable time to investigate the circumstances of the case. No portion of the charge was condemned, and the portion excepted to by the plaintiff was held to be correct.

A municipal corporation authorized to make by-laws and pass ordinances, and inflict penalties for their violation, cannot enforce obedience to them by imprisonment, unless expressly authorized so to do by statute. *Potter, Corp.* § 81; *Clark's Case*, 5 Coke, 64. It was argued before us, on behalf of the defendant, that the ticket sold to the plaintiff was the property of the defendant, intrusted to him for a special purpose, and that it had the right to prevent him, at the end of the journey, from carrying away this property. I am not quite ready to assent that after the defendant sold the ticket to the plaintiff it retained any right of property therein. But, even if it did, it did not detain him on that ground, and he did not then have the ticket in his possession or under his control, and hence a detention to compel him to deliver it up could not, on that ground, be justified.

There was no error in the charge of the judge in reference to the branch of the case we have thus far considered. The counsel of the defendant excepted to that portion of the charge of the judge wherein he said, in substance, that the defendant had no more right to detain plaintiff until he paid his fare than a lawyer would have to detain in his office a client who consulted him, and refused to pay his fee. There was no error in this illustration. The detention in either case is unlawful, and is condemned in the law upon precisely the same principles.

There was no error in refusing to charge the request made by defendant's counsel that "the regulation of the defendant requiring passengers to produce and surrender a ticket or pay the legal fare before leaving the station was a reasonable regulation." It is true that whether a regulation is a reasonable one or not is a question of law for the court, but this request reached too far. It implied that the passenger was to remain in the station, and submit to indefinite detention there, until he paid his fare, and such a regulation would not be reasonable.

It now remains only to be considered whether the defendant was responsible for the acts of the gate-keeper. When the plaintiff attempted to pass through the gate the gate-keeper told him that in resisting and detaining him he was simply doing his duty, and he testified that in all he did he considered that he was acting in the line of

his duty. The defendant's president testified that there was a rigid rule of the company that passengers were required to show at the gate that they had paid their fare in order to be able to pass out; that when they came to the gate the rule was that the gate-keeper was not to let them go out till they either paid their fare or showed a ticket; and that the instructions to the gate-keepers were to collect tickets or fare. From these facts, and all the circumstances of the case, if it is not entirely plain, the jury could at least find that the company expected the gate-keeper would detain a passenger who could not or would not produce a ticket or pay his fare at the gate, and the gate-keeper clearly understood that it was his duty so to do. In anything that he did, he did not act for any purpose of his own, but to discharge what he believed to be his duty to his principal. It matters not that he exceeded the powers conferred upon him by his principal, and that he did an act which the principal was not authorized to do, so long as he acted in the line of his duty, or, being engaged in the service of the defendant, attempted to perform a duty pertaining, or which he believed to pertain, to that service. He detained the plaintiff at the station, caused his arrest, went with the police officer to the police station, there made a complaint, and then, the next morning, appeared before the police magistrate, and renewed his complaint. These were successive steps taken by the gate-keeper to enforce the payment of the fare by the plaintiff, or to punish him for refusing to pay it, and for all that he did the defendant is responsible. The principles upon which the liability of a master rests in such a case have been so fully and plainly laid down in recent cases in this court that a restatement of them now would serve no useful purposes. *Rounds v. Railroad Co.*, 64 N. Y. 129, 21 Am. Rep. 597; *Mott v. Ice Co.*, 73 N. Y. 543; *Devine v. Mills*, 90 N. Y. 637, mem. The judgment should be affirmed, with costs.

All concur, except FINCH, J., dissenting, and RAPALLO, J., not voting.

(Upon the question whether a master is liable for a wrongful imprisonment by his servant, see *American Exp. Co. v. Patterson*, 73 Ind. 430; *Abrahams v. Deakin* [1891] 1 Q. B. 516; *Palmeri v. Manhattan R. Co.*, 133 N. Y. 261, 30 N. E. 1001, 16 L. R. A. 136, 28 Am. St. Rep. 632; *Craven v. Bloomington*, 171 N. Y. 439, 64 N. E. 169; *Krulevitz v. Eastern R. Co.*, 143 Mass. 228, 9 N. E. 613; *National Bank of Commerce v. Baker*, 77 Md. 462, 26 Atl. 867; *Clark v. Starin*, 47 Hun, 345.)

— Arrest upon void process.

(1) Liability of magistrate.

(18 Hun, 132.)

BLODGETT v. RACE.

(Supreme Court of New York, General Term, Third Department. May Term, 1879.)

FALSE IMPRISONMENT—MAGISTRATE—LACK OF JURISDICTION.

A written complaint on oath that certain goods were stolen, and that the complainant "has probable cause to suspect and does suspect" that a certain person stole them, without any further proof, does not give the magistrate jurisdiction to issue a warrant for the arrest of the person charged. If a warrant be issued and the person accused be arrested, the warrant is without lawful authority, and the magistrate is liable for false imprisonment.

Appeal from an order of the county court of Greene county denying a motion of the plaintiff for a new trial, made upon a case and exceptions.

On the 7th day of September, 1874, Luther Bailey presented his written complaint on oath to the defendant, wherein he alleged that certain goods of the value of more than \$25 were, on or about the 14th day of April, 1874, at the town of Jewett, Greene county, N. Y., stolen from Division No. 209 of the Sons of Temperance, "and that the said Luther Bailey has probable cause to suspect and does suspect that Frederick Blodgett, of the town of Jewett, county of Greene aforesaid, did feloniously steal, take, and carry away the said goods, chattels, and property, in manner and form, and at the time and place, aforesaid." On the same day, at the request of said Bailey, the defendant issued his warrant for the arrest of said Blodgett, the plaintiff herein, upon the charge so made in the aforesaid complaint, without any further evidence. The defendant assumed to act in the premises as a justice of the peace. The warrant was delivered to a constable on the day of its issue, who on the same day arrested the plaintiff thereon, and brought him before the defendant.

This action was subsequently commenced to recover damages for false imprisonment. The plaintiff was nonsuited on the trial.

BOCKES, J. A complaint in writing, charging a criminal offense, although on information and belief only as to the person suspected of having committed it, is sufficient to authorize an investigation before a magistrate by the examination of witnesses. The magistrate on such complaint may issue subpoenas for witnesses, and has jurisdiction of

the subject-matter of the offense charged to have been committed, and may compel the attendance of witnesses by attachment in case of disobedience of the subpoena. *People v. Hicks*, 15 Barb. 153. But before a warrant can lawfully issue for the arrest of the offender the magistrate must have some evidence of his guilt. Facts and circumstances, stated on information and belief only, without giving any sufficient grounds on which to base the belief, are insufficient to confer jurisdiction as to the person. The magistrate must have evidence of probable cause, both as to the commission of the offense and the guilt of the offender, before he can have jurisdiction to cause the arrest. *Comfort v. Fulton*, 39 Barb. 56; *Vredenburg v. Hendricks*, 17 Barb. 179; *Wilson v. Robinson*, 6 How. Prac. 110; *Pratt v. Bogardus*, 49 Barb. 89; *The People v. Hicks*, 15 Barb. 153; *Wells v. Sisson*, 14 Hun, 267; *Carl v. Ayers*, 53 N. Y. 14. It is laid down in *Waterman's Notes to Archbold's Criminal Practice and Pleadings* (volume 1, 120, marg. p. 31) that a warrant cannot be issued against one if his guilt appears only from hearsay and mere rumor, but that a case of probable guilt on the part of the accused must be made out. If facts and circumstances be stated sufficient to call for judicial determination, the magistrate will be protected in his action, and this although he might err in judgment. In such case he is to be fully protected, and the error can only be made available on writ of error or appeal in the action or proceeding in which the error occurred. As to the case in hand, it seems that the warrant was issued on less proof, even, than information or belief, as regards the plaintiff. It was issued on an allegation only of "suspicion and belief" as to the plaintiff's guilt. No fact or circumstance whatever was stated to support the suspicion, even much less to support a conclusion of probable cause against him. The warrant was without jurisdiction; hence afforded the defendant no protection against the charge of an illegal arrest. It is not necessary here to hold that the defendant had no ground for committing the plaintiff after the open public examination was had. It is quite possible, and I think it must be assumed, that there was sufficient evidence given before him to uphold his conclusion to commit. But we do not pass upon that question here. The original arrest directed by the defendant was unauthorized, and the nonsuit herein was therefore improperly granted. This conclusion renders it unnecessary to examine other questions raised in the case. Perhaps it should be further remarked that the case as presented on this appeal does not appear to be one of serious enormity. The good faith of the defendant in issuing the warrant is not denied. The plaintiff was in no way seriously oppressed; on the contrary, was allowed great liberty after his arrest, and during the examination, and finally submitted to be committed rather than give bail, which it seems was easily to be obtained. Whether or not the plaintiff may recover more than nominal

damages is for a jury to determine. The order appealed from denying a new trial must be reversed.

LEARNED, P. J., and BOARDMAN, J., concurred.

Order reversed; new trial granted, costs to abide event.

(Leading decisions in support of this doctrine are *Vaughn v. Congdon*, 56 Vt. 111, 48 Am. Rep. 758; *Kelly v. Bemis*, 4 Gray, 83, 64 Am. Dec. 50 [warrant issued under unconstitutional statute]; *McKelvey v. Marsh*, 63 App. Div. 396, 71 N. Y. Supp. 541; *Lanpher v. Dewell*, 56 Iowa, 153, 9 N. W. 101. The *ratio decidendi* of *Blodgett v. Race*, ante, p. 227, is explained in *Swart v. Rickard*, 148 N. Y. 264, 269, 42 N. E. 665.)

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(44 N. J. Law, 654, 43 Am. Rep. 412.)

GROVE v. VAN DUYN et al.

(Court of Errors and Appeals of New Jersey. November Term, 1882.)

1. FALSE IMPRISONMENT—ACT OF JUDICIAL OFFICER—LIABILITY.

A judicial officer having general powers is responsible for unlawful imprisonment in causing an arrest in a given case belonging to a class of cases over which he has cognizance, unless the case is, by complaint or other proceeding, put at least colorably under his jurisdiction.

2. SAME.

Under the statute of New Jersey (Revision, p. 244, § 99), making it an indictable offense to carry off any corn, a sworn complaint charging one with entering certain lands and carrying off a quantity of cornstalks placed the case colorably under the justice's jurisdiction, so that he was not liable for issuing a warrant thereon.

3. SAME—LIABILITY OF PERSON MAKING COMPLAINT.

One who merely made a sworn complaint, setting forth the facts truly, before a justice of the peace having general jurisdiction in such cases, was not liable for unlawful imprisonment, even if the acts of the justice, in issuing a warrant thereon and causing the arrest of the accused, were extrajudicial.

On Error to the Middlesex Circuit.

Action by William H. Grove, Jr., against Cornelius Van Duyn and Charles L. Stout for trespass for assault and false imprisonment. Judgment of nonsuit, and plaintiff brings error.

On a sworn complaint of Cornelius Van Duyn that William H. Grove and others had entered on the lands of Samuel Van Tilburgh, and with force and arms had unlawfully carried away a quantity of cornstalks, Charles L. Stout, a justice of the peace, issued a warrant. They were arrested, and, having waived examination, were committed to jail. Having given bail the next day, Grove brought this suit in trespass for assault and unlawful imprisonment.

BEASLEY, C. J. Most of the general principles of law pertaining to that branch of this controversy which relates to the alleged liability of the defendant in this suit, who was a justice of the peace, are so completely settled as not to be open to discussion. The doctrine that an action will not lie against a judge for a wrongful commitment, or for an erroneous judgment, or for any other act made or done by him in his judicial capacity, is as thoroughly established as are any other of the primary maxims of the law. Such an exemption is absolutely essential to the very existence, in any valuable form, of the judicial office itself; for a judge could not be either respected or independent if his motives for his official actions or his conclusions, no matter how erroneous, could be put in question at the instance of every malignant or disappointed suitor. Hence we find this judicial immunity has been conferred by the laws of every civilized people. That it exists in this state in its fullest extent has been repeatedly declared by our own courts. Such was pronounced by the Supreme Court to be the admitted principle in the case of *Little v. Moore*, 4 N. J. Law, 75, 7 Am. Dec. 574; *Taylor v. Doremus*, 16 N. J. Law, 473; *Mangold v. Thorpe*, 33 N. J. Law, 134; and by this court in *Loftus v. Fraz*, 43 N. J. Law, 667. To this extent there is no uncertainty or difficulty whatever in the subject.

But the embarrassment arises where an attempt is made to express with perfect definiteness when it is that acts done by a judge, and which purport to be judicial acts, are such within the meaning of the rule to which reference has just been made. It is said everywhere in the text-books and decisions that the officer, in order to entitle himself to claim the immunity that belongs to judicial conduct, must restrict his action within the bounds of his jurisdiction, and jurisdiction has been defined to be "the authority of the law to act officially in the particular matter in hand." *Cooley on Torts*, 417. But these maxims, although true in a general way, are not sufficiently broad to embrace the principle of immunity that appertains to a court or judge exercising a general authority. Their defect is that they leave out of the account all those cases in which the officer in the discharge of his public duty is bound to decide whether or not a particular case, under the circumstances as presented to him, is within his jurisdiction, and he falls into error in arriving at his conclusion. In such instance, the judge, in point of fact and law, has no jurisdiction, according to the definition just given, over "the particular matter in hand," and yet, in my opinion, very plainly he is not responsible for the results that wait upon his mistake. And it is upon this precise point that we find confusion in the decisions. There are certainly cases which hold that if a magistrate in the regular discharge of his functions causes an arrest to be made under his warrant on a complaint which does not contain the charge of a crime cognizable by him he is answerable in an action for the injury that has ensued. But I think these cases are de-

flections from the correct rule; they make no allowance for matters of doubt and difficulty. If the facts presented for the decision of the justice are of uncertain signification with respect to their legal effect, and he decides one way, and exercises a cognizance over the case; if the superior court in which the question arises in a suit against the justice differs with him on this close legal question—is he open, by reason of his error, to an attack by action? If the officer's exemption from liability is to depend on the question whether he had jurisdiction over the particular case, it is clear that such officer is often liable under such conditions, because the higher court, in deciding a doubtful point of law, may have declared that some element was wanting in the complaint which was essential to bring this case within the judicial competency of the magistrate. But there are many decisions which perhaps, without defining any very clear rule on the subject, have maintained that the judicial officer was not liable under such conditions. The very copious brief of the counsel of the defendants abounds in such illustrations. As an example, we may refer to the old case of *Gwinne v. Poole*, 2 Lutw. 387, in which it was held that the justice was justified because he had reason to believe that he had jurisdiction, although there was an arrest in an action which arose out of the justice's jurisdiction. This case has been since approved in *Kemp v. Neville*, 10 C. B. (N. S.) 550. Here, if the test of official liability had been the mere fact of the right to take cognizance over the particular matter in hand, considered in the light of strict legal rules, this decision would have been the opposite of what it is. In the same way the subject is elucidated in *Brittain v. Kinnard*, 1 B. & B. 432, the facts being a conviction by a justice of a person of having gunpowder in a certain boat, a special act authorizing the detention of any suspected boat; and when the magistrate was sued in trespass for an illegal conviction it was declared that the plaintiff, in order to show the defendants' want of cognizance over the proceedings leading to the conviction, could not give evidence that the craft in question was a vessel, and not a boat, because the justice had judicially determined that point. And in this case likewise the test of jurisdiction in the magistrate, in point of fact and of law, was rejected; an inquiry into the authority by force of which the proceedings had been taken being disallowed for the reason that such question had been passed upon by the magistrate himself, the point being before him for adjudication. The same doctrine was promulged in explicit and forcible terms by Mr. Justice Field, delivering the opinion of the Supreme Court of the United States, in the case of *Bradley v. Fisher*, 13 Wall. 335, 20 L. Ed. 646, this being his language: "If a judge of a criminal court, invested with general criminal jurisdiction over offenses committed within a certain district, should hold a particular act to be a public offense which it is not, and proceed to the arrest and trial of a party charged with such act, \* \* \* no personal liability to civil action

for such acts would attach to the judge, although those acts would be in excess of his jurisdiction, or of the jurisdiction of the court held by him, for these are particulars for his judicial consideration, whenever this general jurisdiction over the subject matter is invoked."

These decisions, in my estimation, stand upon a proper footing, and many others of the same kind might be referred to; but such course is not called for, as it must be admitted that there is much contrariety of results in this field, and the references above given are amply sufficient as illustrations for my present purposes. The assertion, I think, may be safely made that the great weight of judicial opinion is in opposition to the theory that if a judge, as a matter of law and fact, has not jurisdiction over the particular case, that thereby, in all cases, he incurs the liability to be sued by any one injuriously affected by his assumption of cognizance over it. The doctrine that an officer having general powers of judicature must, at his peril, pass upon the question, which is often one difficult of solution, whether the facts before him place the given case under his cognizance, is as unreasonable as it is impolitic. Such a regulation would be applicable alike to all courts and to all judicial officers acting under a general authority, and it would thus involve in its liabilities all tribunals except those of last resort. It would also subject to suit persons participating in the execution of orders and judgments rendered in the absence of a real ground of jurisdiction. By force of such a rule, if the Supreme Court of this state, upon a writ being served in a certain manner, should declare that it acquired jurisdiction over the defendant, and judgment should be entered by default against him, and if, upon error brought, this court should reverse such judgment on the ground that the service of the writ in question did not give the inferior court jurisdiction in the case, no reason can be assigned why the justices of the Supreme Court should not be liable to suit for any injurious consequence to the defendant proceeding from their judgment. As I have said, in my judgment the jurisdictional test of the measure of judicial responsibility must be rejected.

Nevertheless, it must be conceded that it is also plain that in many cases a transgression of the boundaries of his jurisdiction by a judge will impose upon him a liability to an action in favor of the person who has been injured by such excess. If a magistrate should, of his own motion, without oath or complaint being made to him, on mere hearsay, issue a warrant and cause an arrest for an alleged larceny, it cannot be doubted that the person so illegally imprisoned could seek redress by a suit against such officer. It would be no legal answer for the magistrate to assert that he had a general cognizance over criminal offenses, for the conclusive reply would be that this particular case was not, by any form of proceeding, put under his authority.

From these legal conditions of the subject my inference is that the

true general rule with respect to the actionable responsibility of a judicial officer having the right to exercise general powers is that he is so responsible in any given case belonging to a class over which he has cognizance, unless such case is, by complaint or other proceeding, put at least colorably under his jurisdiction. Where the judge is called upon by the facts before him to decide whether his authority extends over the matter, such an act is a judicial act, and such officer is not liable in a suit to the person affected by his decision, whether such decision be right or wrong. But when no facts are present, or only such facts as have neither legal value nor color of legal value in the affair, then, in that event, for the magistrate to take jurisdiction is not in any manner the performance of a judicial act, but simply the commission of an unofficial wrong. This criterion seems a reasonable one. It protects a judge against the consequences of every error of judgment, but it leaves him answerable for the commission of wrong that is practically willful. Such protection is necessary to the independence and usefulness of the judicial officer, and such responsibility is important to guard the citizen against official oppression.

The application of the above-stated rule to this case must, obviously, result in a judgment affirming the decision of the circuit judge. There was a complaint, under oath, before this justice, presenting for his consideration a set of facts to which it became his duty to apply the law. The essential things there stated were that the plaintiff, in combination with two other persons, "with force and arms," entered upon certain lands, and "with force and arms did unlawfully carry away about four hundred bundles of cornstalks, of the value," etc., and were engaged in carrying other cornstalks from said lands. By a statute of this state (Revision, p. 244, § 99) it is declared to be an indictable offense "if any person shall willfully, unlawfully, and maliciously" set fire to or burn, carry off, or destroy any barrack, cock, crib, rick, or stack of hay, corn, wheat, rye, barley, oats, or grain of any kind, or any trees, herbage, growing grass, hay, or other vegetables, etc. Now, although the misconduct described in the complaint is not the misconduct described in this act, nevertheless the question of their identity was colorably before the magistrate, and it was his duty to decide it; and, under the rule above formulated, he is not answerable to the person injured for his erroneous application of the law to the case that was before him.

As to the other defendant, all he did was to make his complaint on oath before the justice, setting forth the facts truly, and for such an act he could not be held liable for the judicial action which ensued, even if such action had been extrajudicial. But as the case was, as we have seen, brought within the jurisdiction of the judicial officer, neither this defendant nor any other person could be treated as a trespasser for his co-operation in procuring a decision and commitment

which were valid in law until they had been set aside by a superior tribunal.

Let the judgment be affirmed.

All concur.

(This doctrine is sustained by the following leading cases: *Booth v. Kurrus*, 55 N. J. Law, 370, 26 Atl. 1013; *Harrison v. Clark*, 4 Hun, 685; *Bocock v. Cochran*, 32 Hun, 521; *Austin v. Vrooman*, 128 N. Y. 229, 28 N. E. 477, 14 L. R. A. 138; *Doty v. Hurd*, 124 Mich. 671, 83 N. W. 632; *Murphy v. Walters*, 34 Mich. 180.)

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## (2) Liability of complainant or party suing out process.

(7 Gray, 53, 66 Am. Dec. 457.)

**BARKER v. STETSON et al.**

(Supreme Judicial Court of Massachusetts. Middlesex. October Term, 1856.)

**TRESPASS—LIABILITY OF COMPLAINANT FOR ACTS OF OFFICER UNDER VOID PROCESS.**

Making a complaint to a magistrate does not render the complainant liable in trespass for acts done under a warrant issued thereon by the magistrate, even if the magistrate has no jurisdiction to issue such process in the given case. Thus where the process was issued under an unconstitutional statute, and was therefore void, the complainant was held not liable.

Action of tort for entering the plaintiff's shop, and taking and carrying away therefrom two casks of intoxicating liquors. The answer denied the entry and the taking.

At the trial in the court of common pleas, before Sanger, J., the plaintiff introduced evidence that the defendants signed and made oath to a complaint to a justice of the peace, under St. 1852, c. 322, § 14, praying him to issue his warrant for the seizure of the plaintiff's liquors, and a warrant was issued thereon by said justice, and served by a deputy sheriff by entering the shop and seizing the liquors.

The defendants contended, and the court ruled, that upon this evidence the plaintiff could not maintain his action. The plaintiff became nonsuit, and alleged exceptions to the ruling.

**METCALF, J.** The defendants made a complaint to a magistrate, under St. 1852, c. 322, § 14, and therein prayed him to issue process for the seizure of the plaintiff's liquors; and they did nothing more. The magistrate issued the process, and an officer served it according to its precept. The section of the statute under which this process was issued being unconstitutional, the magistrate had no jurisdiction, the process was void, and the service of it was a trespass upon the plaintiff, for which the magistrate and the officer are answerable. *Fisher v. McGirr*, 1 Gray, 1, 61 Am. Dec. 381; *Kelly v. Bemis*, 4 Gray,

83, 64 Am. Dec. 50. Are the defendants also answerable in the form of action which the plaintiff has adopted? It is quite clear that they are not. The authorities are conclusive that when a person does no more than to prefer a complaint to a magistrate, he is not liable in trespass for the acts done under the warrant which the magistrate thereupon issues, even though the magistrate has no jurisdiction. If the complaint is malicious and without probable cause, the complainant may be answerable in another form of action. *Brown v. Chapman*, 6 C. B. 365; *Carratt v. Morley*, 1 Gale & Dav. 275, and 1 Ad. & El. N. S. 18; *Cooper v. Harding*, 7 Ad. & El. N. S. 928; *West v. Smallwood*, 3 M. & W. 418, and Horn & Hurlst. 117; *Barber v. Rollinson*, 1 Cr. & M. 330, and 3 Tyrwh. 266. See, also, a recognition of this doctrine by Lord Campbell in *Chivers v. Savage*, 5 El. & Bl. 701.

Exceptions overruled.

(This is not a case of false imprisonment, but the principle is the same in such a case also. All the cases cited in the decision, except the first, were cases of false imprisonment. See also *Gifford v. Wiggins*, 50 Minn. 401, 52 N. W. 904, 18 L. R. A. 356; *Whaley v. Lawton*, 62 S. C. 91, 40 S. E. 128, 56 L. R. A. 649; *Tillman v. Beard*, 121 Mich. 475, 80 N. W. 248, 46 L. R. A. 215; *Dusy v. Helm*, 59 Cal. 188; *Teal v. Fissel* [C. C.] 28 Fed. 351.)

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(7 Gray, 55, 66 Am. Dec. 459.)

#### EMERY v. HAPGOOD.

(Supreme Judicial Court of Massachusetts. Middlesex. October Term, 1856.)

#### FALSE IMPRISONMENT—WANT OF JURISDICTION—VOID WARRANT—LIABILITY OF PARTY INSTIGATING ARREST.

A complainant who obtains a warrant from a magistrate who has no jurisdiction of the cause, and instigates and induces an officer to arrest the defendant thereon, is liable in damages for false imprisonment to the party arrested, without regard to the fact whether the warrant is valid on its face or not. Since the warrant is in reality void, and the complainant is under no duty to cause it to be executed, he is not entitled to the exemption of an officer, who is protected if a warrant be valid on its face and be issued by a court or magistrate apparently having jurisdiction of the case or subject-matter.

In action of tort for assault and false imprisonment defendant complained of plaintiff before a justice of the peace for the alleged violation of the liquor law, on which plaintiff was adjudged guilty. On the hearing of said complaint the justice directed the commitment of plaintiff to jail for contempt. The justice had no jurisdiction, either of the original complaint or to enter the order of commitment for contempt. The warrant of commitment for contempt was served on plaintiff at the instigation and through the inducement of defendant. Judgment on verdict for plaintiff.

BIGELOW, J. The want of jurisdiction in the magistrate to try and determine the complaint originally made by the defendant against the plaintiff, and the invalidity of the commitment of the plaintiff for contempt, are fully settled in *Piper v. Pearson*, 2 Gray, 120, 61 Am. Dec. 438. In that case the proceedings before the magistrate were similar to those in the case at bar.

The only question therefore arising in this case is whether, upon the facts proved, the defendant is liable as a trespasser. In deciding this question it is unnecessary to determine upon the regularity of the form of the warrant of commitment. This is not an action against an officer for serving the warrant, or against a person acting by or under his authority or sanction. If it were, it would be essential to consider whether the warrant was bad on its face, and disclosed the want of jurisdiction in the magistrate who issued it. For reasons founded on public policy, and in order to secure a prompt and effective service of legal process, the law protects its officers, and those acting under them, in the performance of their duties, if there is no defect or want of jurisdiction apparent on the face of the writ or warrant under which they act. The officer is not bound to look beyond his warrant. He is not to exercise his judgment touching the validity of the process in point of law; but if it is in due form, and is issued by a court or magistrate apparently having jurisdiction of the case or subject-matter, he is to obey its command. In such case he may justify under it, although in fact it may have been issued without authority, and therefore be wholly void.

But such is not the rule applicable to strangers or third persons, who are not required, in the exercise of a public duty, to assume the responsibility of executing legal process. If they interfere of their own motion, without authority or command from the officers of the law, to cause a writ or warrant to be enforced, they act at their peril; and if the process, though regular on its face and apparently good, was unauthorized, or was issued by a tribunal having no jurisdiction, or acting beyond the scope of its power, they are liable for the consequences arising from the enforcement of unlawful process. It is upon this ground that a party is held responsible at whose suit execution is made when the officer serving it incurs no liability. The rule is that if a stranger voluntarily takes upon himself to direct or aid in the service of a bad warrant, or interposes and sets the officer to do execution, he must take care to find a record that will support the process, or he cannot set up and maintain a justification. *Barker v. Braham*, 3 Wils. 376; *Parsons v. Loyd*, 3 Wils. 341; *Bryant v. Clutton*, 1 M. & W. 408; *West v. Smallwood*, 3 M. & W. 418; *Codrington v. Lloyd*, 8 Ad. & El. 449; *Carratt v. Morley*, 1 Ad. & El. N. S. 18; *Green v. Elgie*, 5 Ad. & El. N. S. 114.

In the present case the defendant was a volunteer in urging the officer to serve a void warrant upon the plaintiff; and, under the instructions

given to the jury, it is found by their verdict that the plaintiff would not have been committed to jail but for his interference and instigation. He was, in a legal sense, a stranger to the warrant. It was not his duty or within his province to cause it to be enforced. After having made and signed the original complaint, and testified in its support before the magistrate, his duty and responsibility were at an end. *Barker v. Stetson*, ante, 234. He cannot, therefore, shelter himself under the authority of the officer, and claim immunity on the ground that the warrant was regular, and disclosed no want of jurisdiction in the magistrate. But it being apparent by the record that the warrant was illegally issued and void, the defendant is responsible for the trespass which he caused to be committed upon the plaintiff.

#### Judgment on the verdict.

(Other important cases sustaining this doctrine are *Hewitt v. Newburger*, 141 N. Y. 538, 36 N. E. 593; *Loomis v. Render*, 41 Hun, 268; *Gelzenleuchter v. Niemeyer*, 64 Wis. 316, 25 N. W. 442, 54 Am. Rep. 616; *Frazier v. Turner*, 76 Wis. 562, 45 N. W. 411. But one who has procured the imprisonment of another on a *lawful warrant* is not liable to an action for false imprisonment, though he obtained the warrant by misrepresentations [*Coupal v. Ward*, 106 Mass. 289; *Langford v. Boston & A. R. Co.*, 144 Mass. 431, 11 N. E. 697]; or though his object was to enforce payment of a debt [*Mullen v. Brown*, 138 Mass. 114]. If the proceeding was malicious and without probable cause, the remedy would be an action for malicious prosecution.)

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(94 N. Y. 268, 46 Am. Rep. 141.)

GUILLEAUME v. ROWE et al.

(Court of Appeals of New York. December 14, 1883.)

#### 1. VOID EXECUTION—ISSUANCE BY ATTORNEY—LIABILITY OF JUDGMENT CREDITOR.

Where the attorney whom creditors had employed to bring an action issued, upon the judgment recovered by them, a void execution against the person of the judgment debtor, and the debtor was arrested thereon, *held*, that the judgment creditors were liable for the attorney's act, being within the scope of his implied authority, and were therefore responsible for the wrongful imprisonment of the debtor.

#### 2. FALSE IMPRISONMENT—RELEASE—VALIDITY.

Where a judgment debtor, imprisoned under a void execution, was told that unless he signed a release of his right of action for the false imprisonment he would stay in jail a long time, the release then signed by him was void for duress.

Action by Charles S. Guillaume against Edward Rowe and others for false imprisonment. From a judgment of the superior court of the city of New York (48 N. Y. Super. Ct. 169) reversing a judgment in favor of defendants, they appeal. Affirmed.

The defendants employed an attorney to sue plaintiff, and obtained a judgment. An execution against property was returned unsatisfied, and the attorney then issued an execution against the person, and plaintiff was arrested on the 2d of February and lodged in jail. Afterward the defendants, in their own person, under date of February 24th, notified the sheriff that they "countermanded" that execution; and thereupon he informed the prisoner that he had an order to discharge him, if he would sign a stipulation not to sue the execution creditors or their attorney for damages on account of the arrest, and upon his refusing to do so assured him that if he "did not sign it he would have to stay in jail a long time." The prisoner signed the stipulation and was discharged. He then brought this action. Upon the trial it was conceded that the last execution was not authorized by the judgment, and was void.

DANFORTH, J. Upon this appeal the defendants must be held to the point on which they succeeded at the trial term. They then conceded that the arrest of the plaintiff was by virtue of an execution for which there was no authority in law, but had him turned out of court on the sole ground that there was no evidence showing that either of the defendants authorized the issuing of the execution or his arrest. The General Term were of opinion that a case was made out by the plaintiff, and we agree with that court. A party is bound by the acts of his attorney, although he does not give immediate direction as to the proceedings in an action, or is not with him at its successive stages. If he sets the attorney in motion he becomes liable as the cause progresses, and if the result is in his favor is responsible for the methods resorted to for the enforcement of the judgment. This is well settled. *Barker v. Braham*, 3 Wils. 368; *Poucher v. Blanchard*, 86 N. Y. 256. Here the retainer of the attorney was by these defendants, the issuing of the execution was within the scope of his implied authority, and the arrest of the judgment debtor was for the purpose of compelling payment. This was enough to make them liable. There was, however, evidence tending to show actual knowledge on the part of the defendants, and at any rate acquiescence by them in the course adopted by their attorney. The court erred in taking the question from the jury and in dismissing the case as one where no cause of action was made out.

The learned counsel for the appellants now argues that by the stipulation the plaintiff released his right of action. But this proposition was decided against the defendant by the trial judge as well as the General Term. It has no merit. The instrument on which he relies was executed by the plaintiff without consideration and while enduring an imprisonment, which was illegal. It was therefore void for duress (*Foshay v. Ferguson*, 5 Hill, 154; *Evans v. Begleys*, 2 Wend. 243), and the defendants could acquire no right under it.

The General Term properly reversed the judgment and directed a new trial. Its order should be affirmed, and, by reason of the defendant's stipulation, the plaintiff have judgment absolute. All concur.

Order affirmed, and judgment accordingly.

(To the same effect are *Brooks v. Hodgkinson*, 4 H. & N. 712; *Sleight v. Leavenworth*, 5 Duer, 122; cf. *Foster v. Wiley*, 27 Mich. 244, 15 Am. Rep. 185.)

### (3) Liability of officer making arrest.

(76 Me. 128.)

#### ELSEMORE v. LONGFELLOW.

(Supreme Judicial Court of Maine. May 5, 1884.)

#### 1. FALSE IMPRISONMENT—OFFICER MAKING ARREST—VOID PROCESS.

An officer making an arrest under process issued by a magistrate having jurisdiction over the subject-matter of the case is liable for false imprisonment, if the process is void for lack of jurisdiction over the person, and if he can see from its face that it is void.

#### 2. SAME—VALIDITY OF PROCESS.

A complaint for the removal of a pauper to the town where she had her settlement did not allege, as statute required, that the overseers gave a written order to any person to remove the pauper, nor that such person requested the pauper to go with him and that she refused or resisted, nor that such person made the complaint. *Held*, that a warrant issued thereon was void on its face, as showing lack of jurisdiction over the person, so as not to justify an officer in making an arrest thereunder.

Action by Annie D. Elsemore against Isaac P. Longfellow for false imprisonment. Heard on report. Action stands for trial.

The complaint alleged that the plaintiff had been supported in the town of East Machias by the town of Wesley; that the overseers of the poor in Wesley, desiring her removal thither, went to the house of her mother, who refused to deliver her up or to inform them where she was; and that she utterly refused to return to the place of her settlement. A warrant was issued thereon, under which the defendant, a deputy sheriff, arrested her.

By the terms of the report, if the warrant and return and other facts stated were a justification to the officer, the plaintiff should be nonsuit; otherwise the case to stand for trial.

PETERS, J. This is an action against an officer for false arrest and imprisonment, the question involving the sufficiency and validity of the papers under which the officer acted. The theory of the law is to protect an officer in his acts of official duty so far as it reasonably can without injustice to others. The rule should be liberally interpreted in the officer's behalf.

The proceedings in this case were instituted for the removal of a pauper from one town to another by force of the statutory provisions

contained in section 27, c. 24, Rev. St. 1871, and chapter 157, Laws 1879. The subject-matter was within the jurisdiction of the magistrate who issued the process to the officer. The important question is whether a proper process was issued or not; whether the process disclosed a jurisdiction over the person of the plaintiff; in other words, whether the process under which the defendant acted was valid or void.

The officer is protected unless the process is void, and unless he can see from the face of the process itself that it is void. If the process shows its want of validity, the officer is not justified in acting under it. Irregularities merely that are amendable do not vitiate it. An officer has a right to suppose that what may be amended will be amended. Amendable defects do not even justify an officer in refusing to serve the process. Although the cause of action may be ever so informally and imperfectly expressed, still, if a proper cause is indicated, the process may be legal on its face. The officer stands upon defensible ground unless the process be absolutely void. *McGlinchy v. Barrows*, 41 Me. 74; *Thurston v. Adams*, Id. 419; *Gurney v. Tufts*, 37 Me. 130, 58 Am. Dec. 777; *Nowell v. Tripp*, 61 Me. 426, 14 Am. Rep. 572, and cases; *Big. Cas. Torts*, 277; *Bouv. Law Dict. "Arrest."*

Under those rules, and upon the doctrine of the cases most favorably interpreted for the officer, we are forced to the conclusion that neither the facts indicated upon the papers themselves, nor those adduced in evidence, show that the magistrate had any jurisdiction over the person of the plaintiff in the matters alleged. The proceedings were void.

What facts would it have been necessary to allege in order to afford protection to the officer? That the plaintiff was a pauper; that is alleged. That the overseers gave a written order to some person to remove the pauper; that is not alleged. That such person requested the pauper to go with him, and that she refused or resisted; that is not alleged. That such person makes the complaint; that is not alleged. No statutory cause is alleged. A naked order to arrest would not have been sufficient. Reason must be given. Illegal reasons are given. Legal reasons are omitted. If the illegal allegations be expunged, the complaint would be little more than blank paper.

The act of 1879 allows the complaint to be amended at any time before judgment according to the facts. It was not amended. It must be amended according to the facts, and not contrary to or beyond the facts. There is no evidence or suggestion of the existence of any facts to be incorporated into the complaint beyond those alleged. The officer had no reason to believe in the existence of any facts not alleged which could have made the proceedings valid or his own acts justifiable.

Action stands for trial.

WALTON, BARROWS, DANFORTH, and LIBBEY, JJ., concurred.

(The leading case is *Savacool v. Boughton*, 5 Wend. 170, 21 Am. Dec. 181, in which these conclusions are drawn: [1] "If a mere ministerial officer

executes any process, upon the face of which it appears that the court which issued it had not jurisdiction of the subject-matter or of the person against whom it is directed, such process will afford him no protection for acts done under it. [2] If the subject-matter of a suit is within the jurisdiction of a court, but there is a want of jurisdiction as to the person or place, the officer who executes process issued in such suit is no trespasser, unless the want of jurisdiction appears by such process." To the same effect are *Gurney v. Tufts*, 37 Me. 130, 58 Am. Dec. 777; *Jacques v. Parks*, 96 Me. 268, 52 Atl. 763; *Sandford v. Nichols*, 13 Mass. 286, 7 Am. Dec. 151; *Batchelder v. Currier*, 45 N. H. 460; *United Lines Tel. Co. v. Grant*, 137 N. Y. 7, 32 N. E. 1005; *Lewis v. Palmer*, 6 Wend. 370; *Sheldon v. Hill*, 33 Mich. 171; *McLendon v. State*, 92 Tenn. 520, 22 S. W. 200, 21 L. R. A. 738. But if the court has no jurisdiction *over the subject-matter*, the process, though apparently regular, is not merely voidable, but void, and the officer executing the process has no authority, and is therefore liable to an action; as, e. g., where the law under which the process is issued is unconstitutional. *Warren v. Kelley*, 80 Me. 512, 531, 15 Atl. 49; *Fisher v. McGirr*, 1 Gray, 1, 45, 61 Am. Dec. 381; *Barker v. Stetson*, 7 Gray, 53, 66 Am. Dec. 457; *Campbell v. Sherman*, 35 Wis. 103.)

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### — Arrest upon process voidable for "error" or "irregularity."

(103 N. Y. 84, 8 N. E. 251.)

FISCHER v. LANGBEIN et al. (in part).

(Court of Appeals of New York. October 5, 1886.)

#### 1. FALSE IMPRISONMENT—ARREST UNDER VOID OR IRREGULAR PROCESS.

The liability of an attorney who causes the issue of void or irregular process, for loss or injury thereby occasioned to the party against whom it is enforced, attaches, in the case of void process, when the wrong is committed, no preliminary proceeding to vacate or set it aside being necessary to the maintenance of an action. Process, however, that a court has general jurisdiction to award, but which is irregular by reason of the non-performance by the party procuring it of some preliminary requisite, or of the existence of some fact not disclosed in his application therefor, must be regularly vacated or annulled by an order of the court before an action can be maintained for damages occasioned by its enforcement.

#### 2. SAME—ARREST ON PROCESS ISSUED ON ERRONEOUS JUDGMENT OR ORDER.

When a court is called upon to adjudicate upon doubtful questions of law, or determine as to inferences to be drawn from circumstances reasonably susceptible of different interpretations or meanings, and calling for the exercise of the judicial function in their determination, an order or process based on its decision, although afterwards vacated or set aside as erroneous, is not void, nor does it subject the party procuring it to an action for damages thereby inflicted.

#### 3. SAME.

The power of a court to entertain jurisdiction of an action or proceeding does not depend upon the existence of a substantial cause of action, but upon the performance by the party of the prerequisites authorizing it to determine whether one exists or not.

#### 4. SAME—COMMITMENT FOR CONTEMPT.

In proceedings by the defendants in an action to punish the plaintiff therein for contempt, all the facts constituting the alleged contempt were undisputed, and were presented to the court having jurisdiction of the proceedings for its consideration. On the hearing it was conceded that the plaintiff had disobeyed an order of the court, and the only question was whether such disobedience defeated, impaired, impeded, or prejudiced any right or remedy of the defendants. The court decided that plaintiff was guilty of contempt, and ordered him to be committed; but its order was reversed on appeal as erroneous in respect of the question of law. *Held*, that such error did not affect the jurisdiction of the court, nor render the commitment void, and plaintiff could not maintain an action for false imprisonment for his arrest and imprisonment under the commitment.

Appeal from Supreme Court, General Term, First Department.

Action by John Fischer against George Langbein and J. C. Julius Langbein for false imprisonment. Defendants were the attorneys for the defendants in a previous action brought by the plaintiff, John Fischer, for the dissolution of an unincorporated association. In that action an order of reference was made, in which was inserted, with the consent of plaintiff, a provision that plaintiff should pay the costs of the reference if the referee should find in favor of defendants as to certain questions. The referee did so find, but plaintiff neglected to take up his report and pay the fees. Thereupon the defendants' attorneys, defendants in this action, procured an order that plaintiff pay such fees within three days, or show cause why he should not be committed for contempt; and, on a hearing upon the return of the order to show cause, the court decided that plaintiff was guilty of contempt, and ordered that a commitment issue, which was done, and plaintiff was committed to jail thereon. The order for the commitment was afterwards reversed, on appeal, and thereafter plaintiff brought this action against defendants for their participation as attorneys in said proceedings. Plaintiff's complaint was dismissed at the trial, and judgment for defendants was entered thereon, which was affirmed by the general term on appeal. From the judgment of the general term plaintiff appealed.

RUGER, C. J. It cannot be disputed but that an attorney who causes void or irregular process to be issued in an action, which occasions loss or injury to a party against whom it is enforced, is liable for the damages thereby occasioned. In the case of void process the liability attaches when the wrong is committed, and no preliminary proceeding is necessary to vacate or set it aside as a condition to the maintenance of an action. Process, however, that a court has general jurisdiction to award, but which is irregular by reason of the non-performance by the party procuring it of some preliminary requisite, or the existence of some fact not disclosed in his application therefor, must be regularly vacated or annulled by an order of the court before an action can be maintained for damages occasioned by its enforcement. *Day v. Bach*,

87 N. Y. 56. In such cases the process is considered the act of the party, and not that of the court, and he is therefore made liable for the consequences of his act. Void process is such as the court has no power to award, or has not acquired jurisdiction to issue in the particular case, or which does not, in some material respect, comply in form with the legal requisites of such process, or which loses its vitality in consequence of non-compliance with a condition subsequent, obedience to which is rendered essential. Irregular process is such as a court has general jurisdiction to issue, but which is unauthorized in the particular case by reason of the existence or non-existence of some fact or circumstance rendering it improper in such a case. In all cases where a court has acquired jurisdiction in an action or proceeding, its order made or judgment rendered therein, is valid and enforceable, and affords protection to all persons acting under it, although it may be afterward set aside or reversed as erroneous. *Simpson v. Hornbeck*, 3 Lans. 53. Errors committed by a court upon the hearing of an action or proceeding which it is authorized to hear, but not affecting any jurisdictional fact, do not invalidate its orders, or authorize a party to treat them as void, but can be taken advantage of only by appeal or motion in the original action. *Day v. Bach*, supra.

There is no claim made that the order and commitment under which the imprisonment complained of in this case was effected, was void, or even irregular, except for the alleged erroneous determination made by the special term upon the merits of the application. This determination consisted in holding that a contempt had been committed by the plaintiff, while, upon appeal, this court held otherwise. All of the facts constituting the alleged contempt were undisputed, and were presented to the special term for its consideration upon the hearing. After hearing the parties it decided that a contempt had been committed, and ordered the imprisonment complained of. It was conceded on that hearing that the plaintiff has disobeyed an order of the court, and the only question presented for its consideration was whether such disobedience "defeated, impaired, impeded, or prejudiced" a right or remedy of the defendants.<sup>1</sup> Upon the appeal to this court it was held that the case did not clearly show that any right or remedy of the defendants had been defeated, impaired, impeded, or prejudiced by the disobedience alleged, and the order adjudging the plaintiff guilty of a contempt was for that reason reversed as erroneous. *Fischer v. Raab*, 81 N. Y. 235. A simple question of law was thus presented to the court as to whether all of the elements constituting the offense of contempt appeared on the application for the commitment. Whether they did or did not in no sense constituted a jurisdictional question.

<sup>1</sup> "Civil contempt" is defined by the statute law of New York as a "neglect or violation of duty, or other misconduct, by which a right or remedy of a party to a civil action or special proceeding may be defeated, impaired, impeded, or prejudiced." Code Civ. Proc. § 14.

The court concededly had jurisdiction of the parties and the subject-matter of the application, and we think authority to determine whether a contempt had been committed or not; and the question for its consideration was whether the facts of the case brought it within the statutory definition of a "contempt." An erroneous decision of that question in no sense affected the jurisdiction of the court over the subject-matter of the application. In a similar case it was said by this court that the fact that a justice of the peace "had jurisdiction of the person of the plaintiff, and of the subject-matter then pending, did not give him judicial authority to adjudge her guilty of a contempt, and to imprison her therefor. To have that authority there must have arisen before him facts which gave him power to consider the question whether there had been a contempt committed by her: When facts arose which gave him that power, he had a right to adjudicate upon them, and is not liable to an action, though he may have held erroneously as matter of law." *Rutherford v. Holmes*, 66 N. Y. 370.

In the present case the court made an order, upon the application of the plaintiff, referring a certain disputed question of fact to a referee to hear and determine, and, in case such report was against the plaintiff, that he should pay the referee's fees incurred thereon. The plaintiff cannot question the validity of this order, for it was made at his request, and upon his stipulation to pay the fees in the event provided for. The order was therefore lawful, and such as the court had a right to make under the circumstances. The report of the referee being against the plaintiff, he was required to pay the fees, and take it up; but this he neglected and refused to do. For this refusal he was adjudged guilty of contempt. The disobedience of its order by the plaintiff gave the court jurisdiction of the subject-matter, and called upon it to determine whether a contempt had been committed or not. The right to adjudicate upon this question did not depend upon the fact whether the plaintiff was guilty of a contempt, but whether a case had been made calling for an adjudication upon that question. The power of the court to entertain jurisdiction of an action or proceeding does not depend upon the existence of a sustainable cause of action, but upon the performance by the party of the prerequisites authorizing it to determine whether one exists or not.

In *Harman v. Brotherson*, 1 Denio, 537, the defendant, a judicial officer, had awarded a *capias* upon affidavits which did not disclose such a cause of action as subjected the defendant to arrest therefor. He was, however, arrested and imprisoned, and in an action against the judge for false imprisonment it was held that he was exempted from liability by reason of the judicial character of his determination.

In *Landt v. Hiltz*, 19 Barb. 283, a county judge was prosecuted for false imprisonment for granting an order of arrest which was afterwards vacated upon the ground that the affidavit upon which it was founded did not show a sufficient cause for arresting the party. It

was held, however, that the "decision and the order protect the party applying for it, and the attorney and all persons acting in obedience to the order;" that the affidavit presented "a state of facts which called upon the officer to pass judicially upon the question, and to determine whether a case for an order was made out or not." "It presents, to say the least, a colorable case, and that is enough to protect the officer who issued it." It was further said "that the doctrine that the judicial officer is protected whenever he has jurisdiction, and enough is shown to call upon him for a decision, even though he err grossly and even intentionally, has long been firmly established. Upon the same principle of public policy, parties who in good faith institute the proceedings, and act under and in accordance with judicial determination, should be protected from accountability as trespassers whenever the officer is entitled to protection." This case is largely and approvingly quoted from in *Marks v. Townsend*, 97 N. Y. 590, 599.

In *Miller v. Adams*, 7 Lans. 133, affirmed in this court, (52 N. Y. 409,) the defendant was prosecuted for false imprisonment in procuring an attachment for contempt against a third party for not appearing before the judge in supplemental proceedings, in obedience to an order requiring him to do so. The affidavit upon which the attachment was issued was held, upon appeal, to be defective, and not to show the existence of the contempt alleged. It was held, however, that it constituted a protection as well to the officer issuing it as to the party procuring it; that the officer issuing the attachment had "jurisdiction of the matter, and acted judicially in making the order, and it is entirely clear that he cannot be made answerable as a trespasser for an error in judgment."

It seems to us that the case of *Williams v. Smith*, 108 E. C. L. 596, is undistinguishable in principle from this. As concisely stated by Justice Erle, it was as follows: "The master of the rolls decided on the facts that Williams was guilty of contempt in not obeying the order. Such is the judgment of the master of the rolls on the very facts between the parties. The legal inference which that learned judge drew from the facts which were presented to him on the part of Williams was that he was guilty of a contempt. Upon appeal the lords justices were of opinion that the master of the rolls came to an erroneous conclusion, and they reversed his decision. That is a totally different thing from setting aside the attachment for irregularity in the proceedings." It was held that the decision of the master of the rolls was a judicial determination that protected the parties acting under it, as well as the officers making it.

The rule to be deduced from these authorities seems to be that when a court is called upon to adjudicate upon doubtful questions of law, or determine as to inferences to be drawn from circumstances reasonably susceptible of different interpretations or meanings, and calling for the exercise of the judicial function in their determination, its deci-

sion thereon does not render an order or process based upon it, although afterwards vacated or set aside as erroneous, void, or subject the party procuring it to an action for damages thereby inflicted. Where the jurisdiction of the court is made to depend upon the existence of some fact of which there is an entire absence of proof, it has no authority to act in the premises; and if it, nevertheless, proceeds and entertains jurisdiction of the proceeding, all of its acts are void, and afford no justification to the parties instituting them as against parties injuriously affected thereby. But if the facts presented to the court call upon it for the exercise of judgment and reason, upon evidence which might in its consideration affect different minds differently, a judicial question is presented, which, however decided, does not render either party or the court making it liable for the consequences of its action.

The judgment of the court below should be affirmed, with costs. All concur.

(Other good illustrations of "error" are *Hallock v. Dominy*, 69 N. Y. 238; *Marks v. Townsend*, 97 N. Y. 590; *Swart v. Rickard*, 148 N. Y. 264, 42 N. E. 665; *Booth v. Kurrus*, 55 N. J. Law, 370, 26 Atl. 1013; *Johnson v. Morton*, 94 Mich. 1, 53 N. W. 816; *Cassier v. Fales*, 139 Mass. 461, 1 N. E. 922. In such cases neither the judge, nor the party suing out the process, nor the officer serving the process is liable for false imprisonment. *Id.* "Irregularity" is explained in *Marks v. Townsend*, 97 N. Y. 590, 601, as generally meaning "some irregular action by the party or his attorney, such as the issuing of a *ca. sa.* before a *fl. fa.* has been issued and returned." *Chapman v. Dyett*, 11 Wend. 31, 25 Am. Dec. 598. In *Everett v. Henderson*, 146 Mass. 89, 92, 14 N. E. 932, 936, 4 Am. St. Rep. 284, this statement is made: "Processes good on their face may be absolutely void for want of jurisdiction in the court or magistrate that issues them, or they may be voidable for error, or they may be voidable for irregularity in obtaining them. Processes voidable for error do not subject the person who directs their use to any liability, even after they are set aside. But processes irregularly obtained may be set aside, and then, as against those who obtained them, acts done under them are deemed to have been done illegally." To the same effect is *Winchester v. Everett*, 80 Me. 535, 15 Atl. 596, 1 L. R. A. 425, 6 Am. St. Rep. 228. Other examples of "irregularity" are these: Issuing an execution on a judgment which had become dormant by lapse of time, without reviving the judgment by *scire facias* [*Blanchenay v. Burt*, 4 Ad. & El. (N. S.) 707]; issuing an execution against an absent defendant, without filing a bond pursuant to statute [*Gardiner Mfg. Co. v. Heald*, 5 Me. 381, 17 Am. Dec. 248; see also *Codrington v. Lloyd*, 8 Ad. & El. 449; *Prentice v. Harrison*, 4 Ad. & El. (N. S.) 852; *Ackroyd v. Ackroyd*, 3 Daly, 38; *Kerr v. Mount*, 28 N. Y. 659; *Simpson v. Hornbeck*, 3 Lans. 53; *McFadden v. Whitney*, 51 N. J. Law, 391, 18 Atl. 62].)

— Arrest upon a warrant, where a warrant is by law necessary.

(70 Me. 464.)

HARWOOD v. SIPHERS (In part).

(Supreme Judicial Court of Maine. January 5, 1880.)

**FALSE IMPRISONMENT—JUSTIFICATION—ARREST UNDER PROCESS.**

Under Const. Me. art. 1, § 5, providing that no warrant to seize any person shall issue without a special designation of the person to be seized, a warrant which merely described the accused as "a person whose name is unknown, but whose person is well known, of V., in the county of K.," was insufficient to protect an officer making an arrest thereunder from liability for false imprisonment.

Action of trespass for false imprisonment by Blake A. Harwood against Joseph Siphers. Verdict for plaintiff, and defendant excepts. Exceptions overruled.

It was admitted that the defendant was a deputy sheriff of the county, duly qualified.

In justification of the acts complained of the defendant read in evidence a certified copy of a warrant issued by the judge of the police court of the city of Gardiner, in said county of Kennebec, dated October 2, 1878, which, with the complaint therein referred to, the officer's return thereon, and the doings of said police judge are parts of the case.

The only description of the accused contained in the complaint (to which the warrant referred) or in the warrant is: "A person whose name is unknown, but whose person is well known, of Vassalboro, in the county of Kennebec."

Defendant contended that said complaint and warrant were sufficient authority for him to do all that he did do, and relied upon the same as a complete justification for all acts proved to have been committed by him in the premises.

The presiding judge ruled that said warrant was insufficient to authorize the arrest and detention of the plaintiff, and that the same did not contain any sufficient description of the person whom the officer was commanded by the magistrate to arrest.

SYMONDS, J. The defendant is a deputy sheriff, who is sued in this action for an illegal arrest and false imprisonment of the plaintiff. He justifies under a warrant from the police court of the city of Gardiner, issued upon complaint made by himself against the present plaintiff for larceny. The only description of the accused in the complaint or warrant is in the following terms: "A person whose name is unknown, but whose person is well known, of Vassalboro, in the county of Kennebec."

The presiding judge ruled that a warrant containing only this description of the accused, although issuing from a court of competent jurisdiction, failed upon its face to afford protection to an officer who arrested and detained a prisoner upon it.

We think the ruling was correct. The knowledge of the complainant of the person intended by the warrant does not aid a defect in it. The averment of such knowledge, therefore, cannot supply any deficiency otherwise existing. This is substantially a warrant against a resident of Vassalboro whose name is unknown, without further designation or description.

"No warrant to search any place, or seize any person or thing, shall issue without a special designation of the place to be searched, and the person or thing to be seized." Const. Me. art. 1, § 5.

The warrant in this case is in accordance neither with the requirements of the Constitution nor with the precedents of the criminal law.

"If the name of the party to be arrested be unknown, the warrant may be issued against him by the best description the nature of the case will allow." 1 Chit. Cr. L. 39; Com. v. Crotty, 10 Allen, 404, 87 Am. Dec. 669.

The omission of the name, as a means of identification, is justified only on the ground of necessity; and when this is not known the warrant must indicate on whom it is to be served in some other way, by a specification of his personal appearance, his occupation, his precise place of residence or of labor, his recent history, or some facts which give the special designation that the Constitution requires.

The conclusion from all the authorities, as given in Bishop on Criminal Procedure, § 680, is "that, both at the common law and in conformity with our constitutional guaranties, proceedings may be instituted and carried on against an offender whose name cannot be ascertained; but in such a case such a description of him must be given as will point to his identity, while yet there is no exact form of the description required. It must be suggested by the particular circumstances; and, of course, it must conform also to any statutory provisions which may exist in the individual state."

The warrant in this case was so irregular and insufficient upon its face as to afford no protection to the officer who proceeded to make an arrest upon it.

Exceptions overruled. Judgment on the verdict.

APPLETON, C. J., and WALTON, BARROWS, DANFORTH, and LIBBEY, JJ., concurred.

(Where a warrant recited a complaint against John R. Miller for a felony, and commanded the officer to arrest the "said William Miller," *held*, that the officer was not justified in arresting John R. Miller, though he was the person intended. *Miller v. Foley*, 28 Barb. 630. So where Vandy M. West, the man intended, was arrested on a warrant against "James West." *West*

**v. Cabell, 153 U. S. 78, 14 Sup. Ct. 752, 38 L. Ed. 643.** This case says [citing many decisions]: "By the common law, a warrant for the arrest of a person charged with crime must truly name him, or describe him sufficiently to identify him. If it does not, the officer making the arrest is liable to an action for false imprisonment." Where a statute prescribed that an arrest could not be made at night on a warrant for a misdemeanor unless by direction of the magistrate indorsed upon the warrant, and officers did make an arrest at night upon a warrant not having such indorsement, they were held liable for false imprisonment. *Murphy v. Kron, 20 Abb. N. C. 259.*)



— Arrest without warrant.

— A. In cases of felony.

(40 N. Y. 463.)

**BURNS v. ERBEN et al. (In part).**

(Court of Appeals of New York. June 12, 1869.)

**1. ARREST BY PRIVATE INDIVIDUAL WITHOUT WARRANT FOR FELONY.**

An arrest by a private individual without a warrant, for felony, is excused only where a felony has in fact been committed, and there was reasonable ground to suspect the person arrested of its commission; but an officer is justified in making an arrest without warrant, though no felony has been actually committed, if he has reasonable ground to suspect that one has been, and that the person arrested committed it.

**2. FALSE IMPRISONMENT—PROBABLE CAUSE—QUESTION FOR COURT.**

Where there is no conflict in the evidence as to the circumstances in an action for false imprisonment, the question of probable cause or reasonable ground of suspicion is one of law, and not for the jury.

Action for false imprisonment of plaintiff. A larceny had been committed in the house of defendant's father at a time when plaintiff, who had been visiting a servant, was the only person, not a member of the family; present in that part of the house from which the property was taken. Defendant, a private person, entered a complaint against her for larceny, and assisted in her arrest by an officer without a warrant. She was taken to the police station, where she was detained for a few minutes, and was then permitted to return to her residence. The officer, Frost, was sued with the defendant, but submitted to a default. From a judgment of nonsuit plaintiff appeals. Affirmed.

**WOODRUFF, J.** By section 8 of the act to establish a metropolitan police district, passed April 15, 1857 (chapter 569, Laws 1857), the members of the police force of that district are given, "in every part of the state of New York, all the common law and statutory powers of constables, except for the service of civil process." And in the amendatory act passed April 10, 1860 (chapter 259, Laws 1860), it is declared, in the twenty-eighth section, that the members of the police

force of that district "shall possess in every part of the state all the common law and statutory powers of constables, except for the service of civil process."

In pursuance of information given by the defendant Erben, the defendant Frost, accompanied by Erben, arrested the plaintiff without warrant, took her to the police station, where she was detained a few minutes, and after some conversation with the officer in charge she was permitted to return to her residence. For this she has brought the present action for false imprisonment.

A felony had been committed that evening at the house of Mr. Henry Erben, the defendant's father. On that point there is no dispute or conflict. The plaintiff had visited the house that evening, and, according to the information upon which the defendant acted, was the only person not a member of the family who had been in the basement. Silver had been stolen from the basement. It was there when the plaintiff entered and until after 8 o'clock, and it was missed very shortly after she left the house. Of these facts the proof was distinct and without contradiction.

Upon a report of these facts, Frost, accompanied by the defendant Erben, made the arrest as above stated.

The inquiry is therefore whether, under the statutes above cited and the common-law rule in respect of arrests made or aided by private persons, the plaintiff was entitled to recover. There were no facts in dispute requiring the submission of any question to the jury, unless it be held that there was no justification.

I have no doubt upon the subject. The writers upon criminal law and the reported cases, so far as I have examined them, hold uniform language.

Lord Tenterden, C. J., in *Beckwith v. Philby*, 6 Barn. & Cres. 635, says: "The only question of law in this case is whether a constable, having a reasonable cause to suspect that a person has committed a felony, may detain such person until he can be brought before a justice of the peace to have his conduct investigated. There is this distinction between a private individual and a constable; in order to justify the former in causing the imprisonment of a person, he must not only make out a reasonable ground of suspicion, but he must prove that a felony has actually been committed; whereas a constable having reasonable ground to suspect that a felony has been committed is authorized to detain the party suspected until inquiry can be made by the proper authorities." See Hawk. P. C. book 2, cc. 12, 13; 1 Russell on Crime, 594, 595; Steph. Cr. L. 242, 243; 1 Chit. Cr. L. 15, 17; *Samuel v. Payne*, Doug. 358; *Lawrence v. Hedger*, 3 Taunt. 14; *Regina v. Toohy*, 2 Ld. Raymond, 130; *Hobbs v. Brandscomb*, 3 Camp. 420; *Davis v. Russell*, 5 Bing. 354; *Cowles v. Dunbar*, 2 Car. & P. 565.

In *Ledwith v. Catchpole*, Cald. Cas. 291, 1 Burns, Justice, pp. 130, 131, Lord Mansfield says, in an action against the officer: "The question

is whether a felony has been committed or not. And then the fundamental distinction is that if a felony has actually been committed a private person may, as well as a police officer, arrest; if not, the question always turns upon this, was the arrest bona fide? Was the act done fairly and in pursuit of an offender, or by design, or malice, or ill will? \* \* \* It would be a terrible thing if, under probable cause, an arrest could not be made; many an innocent man has and may be taken up upon suspicion; but the mischief and inconvenience to the public in this point of view is comparatively nothing; it is of great consequence to the police of the country."

The justification of an arrest by a private person was made in *Allen v. Wright*, 8 Carr. & Payne, 522, to depend on, first, the fact that a felony had been actually committed; and, second, that the circumstances were such that a reasonable person, acting without passion and prejudice, would have fairly suspected the plaintiff of being the person who did it.

These principles are affirmed in this state in *Holley v. Mix*, 3 Wend. 350, 20 Am. Dec. 702, in very distinct terms: "If a felony has been committed by the person arrested, the arrest may be justified by any person without warrant. If an innocent person is arrested upon suspicion by a private individual, such individual is excused if a felony was in fact committed, and there was reasonable ground to suspect the person arrested. But if no felony was committed by any one, and a private individual arrest without warrant, such arrest is illegal, though an officer would be justified if he acted upon information from another which he had reason to believe."

The fact being proved in this case that a felony had in fact been committed, I have no hesitation in saying that, however unfortunate it was to the plaintiff, the circumstances fully justified the suspicion which led to her arrest. It is claimed that these circumstances should have been submitted to the jury. Not so; a verdict finding no reasonable ground of suspicion would have been against evidence. There was no conflict of testimony, and that the arrest was made without malice, in good faith, and upon reasonable grounds, is to my mind incontrovertible.

The appeal appears to me to have been taken upon a misapprehension of the construction and effect of the statutes conferring power on the policeman. I think the power perfectly clear, and I notice that the rules and regulations of the board of police are in conformity therewith; and it is made the duty of the officer to take the arrested person immediately before the police court, or, if made at night or when the courts are not open, immediately to the station house, where the officer on duty is required to examine whether there is reasonable ground for the complaint, and, if so, to cause the party to be taken before the court the next morning. Under such a system, innocent parties may sometimes be subjected to inconvenience and mortification; but any

more lax rules would be greatly dangerous to the peace of the community, and make the escape of criminals frequent and easy. The judgment should be affirmed. All the judges concurring.

Judgment affirmed.

(Leading cases as to the right of a *private person* to arrest for felony without a warrant are *Reuck v. McGregor*, 32 N. J. Law, 70; *Spencer v. Anness*, Id. 100; *Mahaffey v. Byers*, 151 Pa. 92, 25 Atl. 93; *Maliniemi v. Gronlund*, 92 Mich. 222, 52 N. W. 627, 31 Am. St. Rep. 576; *Morley v. Chase*, 143 Mass. 396, 9 N. E. 767; *Garnier v. Squires*, 62 Kan. 321, 62 Pac. 1005; *Howard v. Clarke*, L. R. 20 Q. B. D. 558; *Lister v. Perryman*, L. R. 4 E. & I. App. 521. If a private person communicates to an officer circumstances of suspicion, and leaves it to the officer to act on his own judgment as to making an arrest, he will not be liable if the officer does arrest the accused person, even if the arrest be unlawful; but if the accuser directs the officer to take the alleged offender into custody he is liable for false imprisonment, unless he can justify by showing probable cause. *Hopkins v. Crowe*, 7 C. & P. 373; *Veneman v. Jones*, 118 Ind. 41, 20 N. E. 644, 10 Am. St. Rep. 100; *Miller v. Fano*, 134 Cal. 103, 66 Pac. 183.)

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(96 Mich. 249, 55 N. W. 843.)

WHITE v. McQUEEN (in part).

(Supreme Court of Michigan. June 30, 1893.)

**1. FALSE IMPRISONMENT—ARREST BY OFFICER WITHOUT WARRANT FOR FELONY—PROBABLE CAUSE.**

In an action against an officer for false imprisonment, for making an arrest without a warrant for felony, it is a defense that defendant had reasonable grounds to believe that a felony had been committed and that plaintiff was guilty thereof, and consequently arrested him. Where the facts are admitted, probable cause is a question of law for the court.

**2. SAME.**

In an action for false imprisonment, it appeared that a newspaper article stated that plaintiff and some companions boarded a street car, when drunk, and refused to pay their fare; that the conductor and motorman attempted to put them off, when a fight ensued, and a lady passenger became frightened, jumped from the car, and was injured. *Held*, that there was nothing in the article to justify an arrest without a warrant on the ground that a felony had been committed under a statute which made it a felony willfully and maliciously by act or intimidation to impede or obstruct the regular operation of a railroad; that the facts afforded no probable cause to believe that such a felony had been committed; and that the judge should have instructed the jury that there was no probable cause.

Error to Circuit Court, Kent County; Allen C. Adsit, Judge.

Action by Silas White against John McQueen for false imprisonment. Judgment for defendant, and plaintiff brings error. Reversed.

GRANT, J. Defendant is the sheriff of Kent county. He caused the arrest of plaintiff August 2, 1891, which was Sunday, and impris-

oned him in the county jail until the following day, when he was brought before a justice of the peace, and charged with being disorderly, under an ordinance of the city of Grand Rapids. He was tried upon August 4th, and acquitted. Defendant had no warrant for his arrest. Plaintiff then instituted this suit to recover damages for false imprisonment. The declaration is in the usual form. The plea was "not guilty." Defendant claimed to have arrested plaintiff upon suspicion that he was guilty of a felony. It appears from the evidence that on the Saturday evening previous an altercation had occurred upon a street car between the conductor and two motormen; that during the fight a lady had jumped from the car, and was reported to be seriously injured; and that no arrests were made that night of any of the persons engaged in the fight. The defendant testified that between 8 and 9 o'clock Sunday morning the turnkey of the jail reported to him that there was a riot on East Fulton street by a lot of colored people, and that a lady was killed or nearly killed; that some one had telephoned that there had been a row and a fight on a street car, and that this woman had received serious injuries in consequence of the fight, and thought the authorities ought to take these people in charge. Defendant then went to the office of the street-railway company, and saw Mr. Chapman, who had telephoned to the jail for him. Chapman gave him the names of six persons, including the plaintiff, who, he said, had been engaged in the fight, and wanted him to arrest them. Mr. Chapman told him that these persons had undertaken to run the car; had used profane language; that the conductor undertook to eject some of them from the car; that they all pitched on the conductor, or two conductors, got one of them down, and hammered him; that this lady had gotten off of the car, or jumped off the car, in some way; that she was in a critical condition, and presumed she would die; that he, Chapman, wanted these people taken that day, for if she died they would skip out, and there would be trouble in getting them. On the strength of this information defendant sent two deputies to arrest the plaintiff and the others who were reported to have been engaged in the affair. Defendant thought, but was not positive; that he saw an account of the affair in one of the Sunday morning papers. Plaintiff was a coachman for Dr. Barth. He was found by the officers at his customary work at the barn about 1 o'clock p. m., and promptly told them his name, whereupon he was immediately taken to jail. The case was submitted to the jury upon the theory that if the defendant had probable cause to believe, from the information which he received, that a felony had been committed by the plaintiff, he was justified in making the arrest without a warrant. The court instructed the jury that assault with intent to do great bodily harm, and manslaughter, were felonies. But the crime to which he specifically called their attention was obstructing the operations and business of the street-railway company, under How. St. §§ 9274, 9275. Under the first section it is made a crime

for any person to willfully and maliciously, by any act, or by means of intimidation, impede or obstruct the regular operation and conduct of the business of any railroad company, etc. The second section makes it a crime for two or more persons willfully and maliciously to combine and conspire together for the like purpose. The punishment provided by the first section may be imprisonment in the state's prison for a period not exceeding one year; and under the second section for a like imprisonment not exceeding two years. The court instructed the jury that if the facts conveyed to the defendant justified him in believing that an offense under this statute had been committed, and that the plaintiff was guilty thereof, then he was justified in making the arrest.

When an officer, in arresting fugitives from justice, and those whom he honestly believes have been guilty of a felony, has acted in good faith, and after such an investigation as the circumstances permitted him to make, he will be protected in his action, and will be relieved from the consequences of a false imprisonment. This is required for the protection of society, and to prevent the escape of criminals. So far as appears upon this record, the defendant acted mainly upon the information conveyed to him by Chapman. If he read the newspaper article, (and the judge in his charge assumed that he did,) there was nothing in that to indicate that plaintiff and his companions had been guilty of a felony. The article stated that plaintiff and his companions were very drunk when they boarded the car; that they refused to pay their fare; that they used vile language, which annoyed the passengers; that they refused to get off when asked; that they showed fight when the conductor proceeded to put them off; that the motorman came to his rescue, and with his crank knocked one of the colored men from the car; that the conductor ejected the other; that one of the colored men jumped on again; that he was bleeding profusely, and using vile and filthy language; that when he refused to get off the conductor knocked him from the car with a rock; that the passengers then commenced to jump from the car; and that among those who jumped was a lady, but that she fortunately fell away from the car, and escaped death; and that the names of the colored men were not known to the police, but that they had a good description of them, and, unless they left the city, they would probably be identified. There was nothing in this statement to show that the plaintiff and his companions had been guilty of a violation of the statutes above quoted, or of any felony whatever. There was therefore nothing in it to justify the arrest without a warrant. When the facts are conceded, probable cause is a question of law, which the court must determine. *Pol. Torts*, 192, 193; *Perry v. Sulier*, 92 Mich. 72, 52 N. W. 801; *Huntington v. Gault*, 81 Mich. 155, 45 N. W. 970. Under this record the court should have directed the jury that there was no probable cause for the belief on the part of the defendant that plaintiff had been guilty of a felony. For these rea-

sons the judgment must be set aside, and a new trial ordered. The other justices concurred.

(Important cases to the same effect as to the right of *officers* to arrest without a warrant for felony are *McCarthy v. De Armit*, 99 Pa. 63; *Van v. Pacific Coast Co.* [C. C.] 120 Fed. 699; *Kirk v. Garrett*, 84 Md. 383, 35 Atl. 1089; *Rohan v. Sawin*, 5 Cush. 281; *Com. v. Carey*, 12 Cush. 246; *Wade v. Chaffee*, 8 R. I. 224, 5 Am. Rep. 572; *State v. Underwood*, 75 Mo. 231; *Cahill v. People*, 106 Ill. 621; *Miller v. Fano*, 134 Cal. 103, 66 Pac. 183; *Neal v. Joyner*, 89 N. C. 287; *Newman v. New York, L. E. & W. R. Co.*, 54 Hun, 335, 7 N. Y. Supp. 560; *Snead v. Bonnoil*, 166 N. Y. 325, 59 N. E. 899; *Hogg v. Ward*, 3 H. & N. 417. The burden of proving "probable cause" for the arrest [whether it be made by an officer or by a private person] is on the defendant. *Jackson v. Knowlton*, 173 Mass. 94, 53 N. E. 134; *Edger v. Burke*, 96 Md. 715, 54 Atl. 986; *McCarthy v. De Armit*, 99 Pa. 63. When the facts are undisputed or settled, the question whether there was probable cause is one of law for the court, and not of fact for the jury. *Filer v. Smith*, 96 Mich. 347, 55 N. W. 999, 35 Am. St. Rep. 603; *Id.*, 102 Mich. 98, 60 N. W. 297; *McCarthy v. De Armit*, 99 Pa. 63; *Burns v. Erben*, 40 N. Y. 463. Or, to put the rule otherwise: It is for the jury to find the facts which are supposed to constitute probable cause, and to draw their conclusions from these facts under the instructions of the court. "It is wholly immaterial whether the suspicion arises out of information imparted to the officer by some one else or whether it is founded on the officer's own knowledge. In either event, what amounts to a sufficient ground of suspicion to justify an arrest without a warrant is for the court and not for the jury." *Edger v. Burke*, 96 Md. 715, 54 Atl. 986; *cf. Lister v. Perryman*, L. R. 4 E. & I. App. 521.

If the person arrested be detained longer than is reasonably necessary before being taken before a magistrate, this also constitutes false imprisonment. *Linnen v. Banfield*, 114 Mich. 93, 72 N. W. 1; *cf. Leger v. Warren*, 62 Ohio St. 500, 57 N. E. 506, 51 L. R. A. 193, 78 Am. St. Rep. 738; *Bath v. Metcalf*, 145 Mass. 274, 14 N. E. 133, 1 Am. St. Rep. 455.)

## — B. In cases of breach of the peace.

### (a) By officer.

(40 Mich. 576.)

### QUINN v. HEISEL

(Supreme Court of Michigan. April 22, 1879.)

#### FALSE IMPRISONMENT—ARREST BY OFFICER WITHOUT WARRANT FOR BREACH OF THE PEACE.

An officer may arrest without a warrant for a breach of the peace committed in his presence, but not for a past offense, not a felony, upon information or suspicion thereof. Nor will a threat or other indication of a breach of the peace justify an officer in making an arrest, unless the facts are such as would warrant him in believing an arrest necessary to prevent an immediate execution thereof; and this without reference to any past similar offense of which the person may have been guilty before the arrival of the officer.

Error to Circuit Court, Kent County.

Action of trespass brought before a justice of the peace by John C. Heisel against John Quinn for an assault and battery. Quinn claimed that he was a policeman of the city of Grand Rapids, and gave evidence tending to show that the alleged assault consisted in forcibly arresting Heisel, under an ordinance of that city, for disorderly conduct; there being testimony that Heisel used profane and abusive language to men who were laying railway tracks in front of his house, swearing that he would kill some of them, and approached them with an axe, threatening to cut their heads off, and raised the axe as if about to strike one of them. He resisted arrest, and in the struggle was thrown down and handcuffed. At the trial in the justice's court judgment was rendered for defendant, but, on appeal to the circuit court, plaintiff recovered judgment. Defendant brought error to review the judgment of the circuit court.

MARSTON, J. A careful examination of the record fails to show that plaintiff in error has any cause of complaint. The court certainly charged the jury as to the right of an officer to make arrests without warrant for breaches of the peace, as favorably as common-law rules would warrant, and we are not at present prepared to say that an ordinance of the city of Grand Rapids could authorize arrests without process in cases not justified by common-law principles. The evidence on the part of the plaintiff tended to show that at the time of the arrest there was no disturbance, either actual or threatened, while that on the part of defendant tended to show, not merely a reasonable and probable apprehension of a violation of the ordinance, but an actual disturbance, and the jury was charged that under such circumstances, if a disturbance was found to exist, defendant was justified. The court was requested to charge that, if there had been a breach of the peace before defendant arrived, and plaintiff was about to renew his disorderly conduct, and continue the said breach in presence of the officer, then defendant would be justified in arresting him, even though the disturbance had temporarily ceased, before defendant came on the ground; also if the jury found, as a matter of fact, that plaintiff had been guilty of a breach of the peace before defendant came where he was, and defendant knew the fact, and had reasonable and probable cause to believe plaintiff was about to renew his offense, then he was justified in arresting; also that if the officer received information from the by-standers that there had been a tumult, and that plaintiff was the cause of it, of which fact plaintiff was afterwards found guilty, and plaintiff, in presence of defendant, made use of language indicating an intention on his part to continue the disturbance, then defendant had a right to arrest without process. These requests were refused, and, under the facts in the case, we think properly.

There are many loose general statements in the books as to the right

of officers to make arrests without warrant. That they have a right to arrest for breaches of the peace committed in their presence is conceded by all. It is equally clear that they cannot arrest for a past offense, not a felony, upon information or suspicion thereof, although expressions may be found which would seem to assume such power. How far or when they may interfere by an arrest to prevent a threatened breach of the peace is not equally clear. We are of opinion that a threat or other indication of a breach of the peace will not justify an officer in making an arrest, unless the facts are such as would warrant the officer in believing an arrest necessary to prevent an immediate execution thereof, as where a threat is made, coupled with some overt act in attempted execution thereof. In such cases the officer need not wait until the offense is actually committed. To justify such arrest the party must have gone so far in the commission of an offense that proceedings might thereafter be instituted against him therefor, and this without reference to any past similar offense of which the person may have been guilty before the arrival of the officer. The object of permitting an arrest, under such circumstances, is to prevent a breach of the peace, where the facts show danger of its being immediately committed.

A reference to some of the authorities may not be inappropriate. In *Reg. v. Mabel*, 9 Car. & P. 474, the jury were charged that, under the circumstances stated by the policemen, they had no authority to lay hold of the defendant, unless they were satisfied that a breach of the peace was likely to be committed by the defendant on the person in the parlor. In *Timothy v. Simpson*, 1 Crompt., M. & R. 757, the plea justifying the imprisonment alleged that an affray had been committed, and it appeared that there was danger of its immediate renewal. In *Grant v. Moser*, 5 Man. & G. 123, it was said there should be a direct allegation either of a breach of the peace committing at the time, or that a breach had been committed, and that there was reasonable ground for apprehending its renewal. In *Baynes v. Brewster*, 2 Q. B. 384, a plea to a declaration for false imprisonment was held bad which showed that the violent and illegal conduct was over, and it was not stated, nor did it appear, that it would have been repeated if the apprehension had not taken place. In this case Williams, J., said: "It is not a question, in this place, how far a constable is justified in interfering where an affray is going on in his presence; but no principle is more generally assumed than that a warrant is necessary to entitle him to interfere after the affray is over. It is otherwise where the facts show that the affray is practically going on. That is on account of the obvious distinction, as to public danger, between a riot still raging and one no longer existing." Wightman, J., in speaking of the right to arrest during the affray, and while there is a disposition shown to resist it, quotes from *Timothy v. Simpson* as follows: "Both cases fall within the same principle, which is that, for the sake of the preservation of the peace,

any individual who sees it broken may restrain the liberty of him whom he sees breaking it, so long as his conduct shows that the public peace is likely to be endangered by his acts." In *Wheeler v. Whiting*, 9 Car. & P. 262, Patteson, J., said: "The defendant pleads that the plaintiff was making a disturbance in the house, and ready and desirous to commit a breach of the peace; whereupon he gave him in charge to the policeman, to be dealt with according to law. The policeman, however, was not justified in taking him, unless he saw some breach of the peace committed. On a charge of felony it would be different;" and the learned justice doubted whether a plea which stated that the plaintiff was intending to commit a breach of the peace was good. In *Howell v. Jackson*, 6 Car. & P. 723, Parke, B., distinctly and clearly instructed the jury that to make out the defense they must be satisfied that plaintiff had committed a breach of the peace, and that the watchman saw him do so. In *Knot v. Gay*, 1 Root, 66, it was said an arrest might be made to prevent a breach of the peace which was about to take place. In *State v. Brown*, 5 Har. (Del.) 507, it was said: "A peace-officer, such as a constable or sheriff, has the right to arrest, even without warrant, a person concerned in a breach of the peace, or other crime, or when he has reasonable ground to suspect the party of such offense." Clearly this last clause does not state the law correctly in not limiting the right to cases of felony. In *McCullough v. Com.*, 67 Pa. 32, it was said: "A constable may justify an arrest for a reasonable cause of suspicion alone;" citing in support *Russell v. Shuster*, 8 Watts & S. 309, which was a case of suspicion of felony. In *Com. v. Carey*, 12 Cush. 252, Shaw, C. J., said "that a constable or other peace-officer could not arrest one without a warrant, for a crime proved or suspected, if such crime were not an offense amounting in law to felony." Other cases might be referred to. There is little danger of being misled by the cases in which it is held an officer may make arrests to prevent a threatened breach of the peace. The interposition in the case of merely threatened violence is not for the purpose of an arrest, in the ordinary sense, but as a peace-officer, to prevent a disturbance or breach of the peace, under a present menace of violence. The judgment must be affirmed, with costs. The other justices concurred.

(Leading authorities are *State v. Lewis*, 50 Ohio St. 179, 33 N. E. 405, 19 L. R. A. 449; *McLennon v. Richardson*, 15 Gray, 74, 77 Am. Dec. 353; *Scott v. Eldridge*, 154 Mass. 25, 27 N. E. 677, 12 L. R. A. 379; *People v. Johnson*, 80 Mich. 175, 48 N. W. 870, 13 L. R. A. 163, 24 Am. St. Rep. 116; *Fleetwood v. Com.*, 80 Ky. 1; *Wahl v. Walton*, 30 Minn. 506, 16 N. W. 397. The Legislature may authorize an arrest without warrant for other misdemeanors than breach of the peace, committed in the presence or view of the officer, and this has been done in many states. *Burroughs v. Eastman*, 101 Mich. 419, 59 N. W. 817, 24 L. R. A. 859, 45 Am. St. Rep. 419; *O'Connor v. Bucklin*, 59 N. H. 589; *Hennesy v. Connolly*, 13 Hun, 173; *Tobin v. Bell*, 73 App. Div. 41, 76 N. Y. Supp. 425; *Ballard v. State*, 43 Ohio St. 340, 1 N. E. 76; *Plummer v. State*, 135 Ind. 308, 34 N. E. 968; cf. *Com. v. Wright*, 158 Mass. 149, 33 N. E. 82, 19 L. R. A. 206, 35 Am. St. Rep. 475.)

**(b) By a private person.**

(11 Johns. 486.)

**PHILLIPS v. TRULL**

(Supreme Court of New York. October, 1814.)

**FALSE IMPRISONMENT—ARREST WITHOUT WARRANT—BREACH OF THE PEACE.**

In an action for false imprisonment, it is no justification that plaintiff, having been engaged in an affray, was taken into custody by defendant, a private person, after the affray was ended, and held in custody until he could be brought before a magistrate, when defendant did not act under a warrant.

**Demurrer to plea.**

Action for assault and battery and false imprisonment. The declaration contained three counts, of which the first and second charged an assault and battery and an imprisonment for six days, and the third charged only an assault and battery. Defendant pleaded (1) not guilty; and, (2) as to the assaulting, etc., and imprisoning the plaintiff, and detaining him in prison for the space of 10 hours, part of the time in the first count of the declaration mentioned, that the plaintiff and three other persons, being in a house occupied by one Fitch, made a great noise, affray, disturbance, and riot in the said house, in breach of the peace; and because the defendant, being a laborer and lodger in the said house, at the request of the said Fitch, in attempting to keep the peace and stop the noise, etc., was assaulted by the plaintiff, he gave charge of the said plaintiff to one Curtis to take him into his custody, and keep him until he could be carried before a justice of the peace, to answer for the said breaches of the peace; and that, at the request and by the order of the defendant, the said Curtis gently laid his hands on the said plaintiff, and took him into custody for the purposes aforesaid; but because it was midnight, and the plaintiff could not be immediately carried before a justice of the peace, he was necessarily detained in the custody of Curtis until the next day, and that he was, as soon as he conveniently could be, carried before a justice; and the defendant avers that, by means of the premises, the plaintiff was necessarily imprisoned for the space of 10 hours, part of the said time, which is the same, etc. To this second plea the plaintiff demurred specially, because (1) it does not answer the first count of the declaration; (2) that it is no justification or bar to the action; (3) that it is double and argumentative, and in other respects uncertain, informal, and insufficient.

PLATT, J. All persons whatever, who are present when a felony is committed, or a dangerous wound is given, are bound to apprehend the offenders. 3 Hawk. P. C. 157, "Arrest," s. 1. So any person whatever, if an affray be made, to the breach of the peace, may, without

a warrant from a magistrate, restrain any of the offenders, in order to preserve the peace; but, after there is an end of the affray, they cannot be arrested without a warrant. 2 Inst. 52; Burns, J. P. 92. Hawkins (3 Hawk. P. C. 174, b. 2, s. 20) says: "It seems clear that, regularly, no private person can, of his own authority, arrest another for a bare breach of the peace, after it is over." We are of opinion that the special plea of justification is bad, and the plaintiff is therefore entitled to judgment on the demurrer.

Judgment for plaintiff.

(These statements of early English law in Hawkins' Pleas of the Crown have been modified to some extent by modern English decisions. Thus, in *Timothy v. Simpson*, 1 Cr. M. & R. 757, this summary of the law is given: "It is clear, therefore, that any person present may arrest the affrayer at the moment of the affray, and detain him till his passion has cooled, and his desire to break the peace has ceased, and then deliver him to a peace officer. And if this be so, what reason can there be why he may not arrest an affrayer after the actual violence is over, but whilst he shows a disposition to renew it, by persisting in remaining on the spot where he has committed it. Both cases fall within the same principle, which is that, for the sake of the preservation of the peace, any individual who sees it broken may restrain the liberty of him whom he sees breaking it, so long as his conduct shows that the public peace is likely to be endangered by his acts. In truth, whilst those are assembled together who have committed acts of violence, and the danger of their renewal continues, *the affray itself may be said to continue.*" This view has been upheld by the House of Lords, holding that a private person is justified in arresting, or giving in charge of a policeman, without a warrant, a party who has been engaged in an affray, *while the affray is still continuing, or there is reasonable ground for apprehending that he intends to renew it.* *Price v. Seeley*, 10 Cl. & F. 28. To the same effect is *Balt. & O. R. Co. v. Cain*, 81 Md. 87, 31 Atl. 801, 28 L. R. A. 688. See also *Winn v. Hobson*, 54 N. Y. Super. Ct. 330; *People v. Adler*, 3 Parker, Cr. R. 249; *In re Powers*, 25 Vt. 261; *State v. Campbell*, 107 N. C. 948, 12 S. E. 441; *McGarrahan v. Lavers*, 15 R. I. 302, 3 Atl. 592. These rules apply to officers and private persons alike. *Id.* They are sometimes changed by statute. Thus, in New York an officer or a private person may arrest for any crime committed or attempted in his presence. Code Cr. Proc. §§ 177, 183; *Tobin v. Bell*, 73 App. Div. 41, 76 N. Y. Supp. 425.)

## MALICIOUS PROSECUTION.

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### Elements of action.

(48 Barb. 30.)

MILLER v. MILLIGAN (in part).

(Supreme Court of New York. March 5, 1866.)

#### 1. MALICIOUS PROSECUTION—GROUNDS OF ACTION—BURDEN OF PROOF.

The essential elements of an action for malicious prosecution consist of a previous unfounded prosecution of the plaintiff by the defendant, commenced without probable cause, conducted with malice, and terminating favorably to the party prosecuted. The burden of proof rests on the plaintiff to establish each of these several propositions or fail in his action.

#### 2. SAME—MALICE—PROBABLE CAUSE.

To sustain the action, want of probable cause for the former suit and malice must concur, and the former cannot be inferred from any degree of malice which may be shown.

#### 3. SAME—WHEN NONSUIT GRANTED.

Where plaintiff fails to show that defendant was the real prosecutor in the former suit, or, if so, that he was without evidence or circumstances justifying a reasonable suspicion of the truth of the charge, the complaint may properly be dismissed.

### Exceptions from Circuit Court.

Action for malicious prosecution, on the ground that a former proceeding against plaintiff, in a district court of the United States, in which he was arrested and indicted for having induced a prisoner, in defendant's custody as a deserter from the army, to escape, and was tried and acquitted of the charge, was instigated by defendant maliciously, and was without probable cause. At the trial the court dismissed the plaintiff's complaint, and ordered his exceptions to be heard in the first instance at the general term.

Argued before MILLER, INGALLS, and HOGEBROOM, JJ.

HOGEBROOM, J. The essential elements of this action are well understood. They consist of a previous unfounded prosecution of the plaintiff by the defendant, commenced without probable cause, conducted with malice, and terminating favorably to the party prosecuted. *Vanderbilt v. Mathis*, 5 Duer, 304; *Foshay v. Ferguson*, 2 Denio, 617; *Besson v. Southard*, 10 N. Y. 236; *McKown v. Hunter*, 30 N. Y. 627. In regard to these, the burden of proof rests on the plaintiff, and he must establish each of these several propositions or fail in his action. It is often said, in a general way, that malice and

the want of probable cause are the ingredients of the cause of action; but it is plain that the other ingredients are implied or understood to exist. *Vanduzor v. Linderman*, 10 Johns. 106; *McCormick v. Sisson*, 7 Cow. 715; *Bulkeley v. Smith*, 2 Duer, 261; *Von Latham v. Rowan*, 17 Abb. Prac. 238, 248; *McKown v. Hunter*, 30 N. Y. 627. Thus, in general, very little is said about the defendant having been the prosecutor, because the question ordinarily is not the subject of dispute, and because, generally, the defendant was the adverse party in the action or proceeding which constituted the gravamen of the action for malicious prosecution. But it plainly lies at the very foundation of this action that the plaintiff must show that the defendant, and not somebody else, has prosecuted him,—has been the real party, in fact, who has set on foot and conducted the proceedings against him. This prosecution may have been in the form of a civil action, or of a criminal proceeding; and, when not conducted in the name of the offending party, it would doubtless suffice to prove that he was the real party,—the mover and manager and controller of the prosecution. If he were the mere clerk or agent of others, or a mere witness in the transaction, he would not hold the character nor be liable to the penalties of a malicious prosecutor. So the plaintiff must aver and prove that the prosecution claimed to be malicious is terminated in his favor. *Gorton v. De Angelis*, 6 Wend. 418; *Clark v. Cleveland*, 6 Hill, 344; *Hall v. Fisher*, 20 Barb. 441. Proof that the prosecution complained of was instituted through actual malice is not enough to sustain the action. *Foshay v. Ferguson*, 2 Denio, 617. In an action for malicious prosecution, the plaintiff must allege and prove both malice and a want of probable cause for the former suit. If there was probable cause, the action cannot be maintained, even though the prosecution complained of was malicious. Want of probable cause and malice must concur, and the former cannot be inferred from any degree of malice which may be shown. *Besson v. Southard*, 10 N. Y. 236; *Bulkeley v. Smith*, 2 Duer, 261. I allude to these familiar rules, not for the purpose of establishing their existence, but merely to bring to mind how strict and exacting the courts have been in enforcing them. In the present case I was of opinion at the trial that, in two at least of the particulars essential to constitute the cause of action, there was a lack of evidence to justify a recovery, and I am still of the same opinion. The defendant has, I think, shown probable cause for the prosecution if he is its author, and the plaintiff (which is the real question) has not shown the want of probable cause for the charge. On both of the grounds, the absence of proof to show that the defendant was the real prosecutor, and, if so, that he was without evidence or circumstances justifying a reasonable suspicion of the truth of the charge, I am of opinion that the plaintiff was properly nonsuited, and had no legal right to ask a submission of the facts to the jury. I think no legal error was com-

mitted at the circuit, and that a new trial should be denied, and the defendant have judgment.

MILLER, J., concurred. INGALLS, J., dissented.

(See also as to the elements of this action, *Crescent Live Stock Co. v. Butchers' Co.*, 120 U. S. 141, 7 Sup. Ct. 472, 30 L. Ed. 614; *Magowan v. Rickey*, 64 N. J. Law, 402, 45 Atl. 804; *Campbell v. Baltimore & O. R. Co.*, 97 Md. 341, 55 Atl. 532; *Ripley v. McBarron*, 125 Mass. 272; *Ruth v. St. Louis Transit Co.*, 98 Mo. App. 1, 71 S. W. 1055; *Carbondale Co. v. Burdick* [Kan.] 72 Pac. 781 [malicious *civil action*]. The burden of proof rests on the plaintiff to prove all these elements, unless defendant so pleads as to admit them or some of them. *Abrath v. Northeastern R. Co.*, 11 Q. B. D. 440, affirmed L. R. 11 App. Cas. 247; *Anderson v. How*, 116 N. Y. 336, 22 N. E. 695; *Good v. French*, 115 Mass. 201. An action for malicious prosecution is maintainable against a corporation. *Comford v. Carlton Bk.* [1899] 1 Q. B. 392, [1900] 1 Q. B. 22; *Williams v. Holmes, Booth & Haydens*, 142 N. Y. 492, 37 N. E. 480; *Ruth v. St. Louis Transit Co.*, supra.

When a person, believing that a crime has been committed, sends for an officer and tells him all he knows about the innocence or guilt of the person suspected, and leaves it to the officer to act on his own judgment as to whether there shall be a criminal prosecution, and does no more, he is not liable in an action for malicious prosecution, in case the officer comes to the wrong conclusion and prosecutes when he ought not to do so. *Burnham v. Collateral Loan Co.*, 179 Mass. 268, 60 N. E. 617.)

## Difference between an action for false imprisonment and one for malicious prosecution.

(18 R. I. 84, 25 Atl. 694.)

HOBBS v. RAY.

(Supreme Court of Rhode Island. November 26, 1892.)

### FALSE IMPRISONMENT—NO ACTION FOR ARREST UNDER LAWFUL PROCESS.

An action for false imprisonment will not lie for an arrest made under lawful process, though wrongfully obtained, the remedy being an action for malicious prosecution. The gravamen of the offense of false imprisonment is the unlawful detention of another without his consent, and malice is not an essential element thereof; while, in an action for malicious prosecution, the essential elements are malice and want of probable cause in the proceeding complained of.

Trespass on the case by Lemuel R. Hobbs against Frederick A. Ray for false imprisonment. On demurrer to the declaration, and also on demurrer to a plea in abatement. Demurrer to declaration sustained, and plea in abatement overruled.

PER CURIAM. We think the defendant's demurrer to the plaintiff's declaration should be sustained. The facts set out in the writ

and declaration show a case for malicious prosecution, and not for false imprisonment; and these actions are quite distinct and different from each other. An action of trespass for false imprisonment lies for an arrest, or some other similar act of the defendant, "which," as is said, "upon the stating of it, is manifestly illegal;" while malicious prosecution, on the contrary, lies for a prosecution which, upon the stating of it, is manifestly legal. *Johnstone v. Sutton*, 1 Term R. 510, 544. The declaration in the case at bar shows that the arrest complained of was made under lawful process, although wrongfully obtained. There was, therefore, no false imprisonment, the imprisonment being by lawful authority. *Nebenzahl v. Townsend*, 61 How. Prac. 353, 356. Imprisonment caused by malicious prosecution is not false, unless without legal process or extrajudicial. *Murphy v. Martin*, 58 Wis. 276, 16 N. W. 603; *Colter v. Lower*, 35 Ind. 285, 9 Am. Rep. 735, 7 Amer. & Eng. Enc. Law, 663, 664, and cases cited. See, also, *Turpen v. Remy*, 3 Blackf. 210; *Mitchell v. State*, 12 Ark. 50, 44 Am. Dec. 253, and cases cited; 1 Chitty, Pl. \*133, \*167. The gravamen of the offense of false imprisonment is the unlawful detention of another without his consent, and malice is not an essential element thereof; while, in an action for malicious prosecution, the essential elements are malice and want of probable cause in the proceeding complained of. But while, for the reasons above given, we think the demurrer should be sustained, yet, as the form of action employed by the plaintiff is case, which is the proper one in actions for malicious prosecution, we see no sufficient reason for sustaining the defendant's plea in abatement to the writ and declaration. The demurrer is sustained, and the plea in abatement is overruled, with leave to the plaintiff to file a motion to amend his writ and declaration.

(To the same effect are *Diehl v. Friester*, 37 Ohio St. 473; *Herzog v. Graham*, 9 Lea, 152; *Lisabelle v. Hubert*, 23 R. I. 456, 50 Atl. 837; *Gelzenleuchter v. Niemeyer*, 64 Wis. 316, 25 N. W. 442, 54 Am. Rep. 616; *Marks v. Townsend*, 97 N. Y. 590.)

## Malice.

(66 Me. 202.)

### PULLEN v. GLIDDEN.

(Supreme Judicial Court of Maine. February 19, 1877.)

#### MALICIOUS PROSECUTION—MALICE.

To maintain an action for malicious prosecution, plaintiff must prove "malice in fact" on the part of defendant, as distinguished from "malice in law," which is inferred by law from the commission of an act, wrongful in itself, without justification or excuse. But the plaintiff is not required to prove "express malice" in the popular signification of the term; as, that defendant was prompted by malevolence, or acted from motives of ill will, resentment, or hatred towards plaintiff. It is sufficient if he

prove "malice in fact" *in its enlarged legal sense*, in which an act done willfully and purposely, to the prejudice and injury of another, which is unlawful, is, as against that person, malicious.

#### On exceptions.

Action on the case brought by Willard W. Pullen against James S. Glidden for malicious prosecution. It appeared that defendant had made a complaint before a magistrate charging plaintiff with forgery, and that plaintiff was arrested, but, upon examination, was acquitted and discharged from arrest. Thereupon he brought this action. At the trial the jury found a verdict for defendant. Plaintiff alleged exceptions.

LIBBEY, J. This is an action for malicious prosecution. The presiding judge instructed the jury that there was not probable cause for the prosecution. Upon the question of malice he instructed the jury as follows: "In regard to the other branch of the case necessary to be established by the plaintiff, it is that there was malice; that the prosecution was malicious. Now, what is 'malice'? There are several kinds of malice; but the two kinds of malice that may perhaps be considered in this charge are malice in law and malice in fact. Now, what is malice in law? Malice in law is such malice as is inferred from the commission of an act wrongful in itself, without justification or excuse. This is not the kind of malice required in this case. The malice required to be proved in this case is malice in fact. Malice in fact is where the wrongful act was committed with a bad intent, from motives of ill will, resentment, hatred, a desire to injure, or the like. Did such kind of malice exist in the mind of the defendant when he commenced the prosecution in question? Did he do it from bad intent, from evil motives, or did he not? Malice may be inferred from want of probable cause, or it may be inferred and proved by other evidence in the case." Again: "If you should find that there was no malice, such as I have described, the plaintiff could not maintain this action."

The plaintiff complains that this instruction required the jury to find malice in its more restricted popular sense, when proof of malice in its enlarged legal sense was all that the law requires. To maintain his case, it was necessary for the plaintiff to prove malice in fact, as distinguished from malice in law. Malice in law is where malice is established by legal presumption from proof of certain facts, as in actions for libel, where the law presumes malice from proof of the publication of the libelous matter. Malice in fact is to be found by the jury from the evidence in the case. They may infer it from want of probable cause. But it is well established that the plaintiff is not required to prove "express malice," in the popular signification of the term, as that defendant was prompted by malevolence, or acted from motives of ill will, resentment, or hatred towards the plaintiff. It is

sufficient if he prove it in its enlarged legal sense. "In a legal sense, any act done willfully and purposely, to the prejudice and injury of another, which is unlawful, is, as against that person, malicious." *Com. v. Snelling*, 15 Pick. 337. "The malice necessary to be shown, in order to maintain this action, is not necessarily revenge, or other base and malignant passion. Whatever is done willfully and purposely, if it be at the same time wrong and unlawful, and that known to the party, is, in legal contemplation, malicious." *Wills v. Noyes*, 12 Pick. 324. See, also, *Page v. Cushing*, 38 Me. 523; *Humphries v. Parker*, 52 Me. 502; *Mitchell v. Wall*, 111 Mass. 492. We think, from a fair construction of the instruction upon this point, the jury must have understood that, in order to find for the plaintiff, they must find that the defendant, in prosecuting the plaintiff, was actuated by "express malice," in the popular sense of the term. In this respect it was erroneous.

Exceptions sustained.

APPLETON, C. J., and DICKERSON, DANFORTH, VIRGIN, and PETERS, JJ., concurred.

(The malice involved in malicious prosecution is called variously "malice in fact," "actual malice," "express malice," etc., but whatever name be used the meaning is always the same, viz., actual malice, not in the popular, but in the legal, sense of the expression. As the question is whether malice existed "in fact" when the prosecution was started, it is for the jury to determine, and not for the court. *Cohn v. Saidel*, 71 N. H. 558, 53 Atl. 800; *Besson v. Southard*, 10 N. Y. 236; *Wheeler v. Nesbitt*, 24 How. 544, 16 L. Ed. 765; *Small v. McGovern*, 117 Wis. 608, 94 N. W. 651, and cases *infra*. An admirable definition of the kind of malice meant is the following: "Any wrong or indirect motive. Some other motive than a desire to bring to justice a person whom the prosecutor honestly believes to be guilty." *Brown v. Hawkes* [1891] 2 Q. B. 718; *Messman v. Ihlenfeldt*, 89 Wis. 585, 62 N. W. 522; *Vinal v. Core*, 18 W. Va. 1; *Ripley v. McBarron*, 125 Mass. 272. It is "any evil or unlawful purpose as distinguished from that of promoting justice." *Metropolitan Ins. Co. v. Miller* [Ky.] 71 S. W. 921; cf. *Campbell v. Balt. & O. R. Co.*, 97 Md. 341, 55 Atl. 532. Thus, if the criminal law be put in motion for the purpose of collecting a debt or compelling the delivery of property, or to accomplish some other ulterior and unlawful purpose, it is begun maliciously as much as though inspired by hatred or revenge. *Eggett v. Allen* [Wis.] 96 N. W. 803. Malice *may* be inferred by the jury from evidence showing a want of probable cause, but it is not the rule of law that it *must* be so inferred. *McClafferty v. Philp*, 151 Pa. 86, 24 Atl. 1042; *Small v. McGovern*, 117 Wis. 608, 94 N. W. 651; *Stubbs v. Mulholland*, 168 Mo. 47, 67 S. W. 650; *Stewart v. Sonneborn*, 98 U. S. 187, 25 L. Ed. 116.)

## Want of probable cause.

(2 Denio, 617.)

FOSHAY v. FERGUSON.

(Supreme Court of New York. May, 1846.)

## 1. MALICIOUS PROSECUTION—WANT OF PROBABLE CAUSE.

To maintain an action for malicious prosecution, plaintiff must prove, not only express malice on the part of defendant, but absence of probable cause for the prosecution.

## 2. SAME.

Probable cause is reasonable ground of suspicion, supported by circumstances sufficient to warrant a cautious man in the belief that the person accused is guilty of the offense charged.

## 3. SAME.

The next day after plaintiff had passed defendant's farm with a drove of cattle, it was discovered that some of defendant's cattle were missing, and defendant was informed that several cattle belonging to another person had been driven away, and that he had pursued the drove, and regained them from plaintiff. Defendant also pursued and overtook the drove, and found two of his cattle in it, which he charged plaintiff with stealing, and thereupon plaintiff paid defendant a large amount in cattle and money to settle the matter. *Held*, that there was probable cause for a subsequent charge, made by defendant against plaintiff, of stealing the two cattle, on which plaintiff was indicted; and that defendant was not liable to an action therefor, even though he acted maliciously, and although plaintiff was acquitted on trial of the indictment.

## Motion for new trial.

Action for malicious prosecution in charging plaintiff with stealing cattle, for which he was indicted, but, on trial, was acquitted. It appeared that several of defendant's cattle, kept on his farm, under the charge of one Lambert, were discovered to be missing the next day after plaintiff had passed the farm with a drove of cattle; that some of the missing cattle were found in the route of the drove; that Lambert was told by one Gage that several of the latter's cattle had been driven away, and that he had pursued and overtaken the drove, and had regained his cattle, and the drover had settled with him; that Lambert went to defendant with this information, and they pursued the drove a distance of about 70 miles, and overtook it, and found in it two of defendant's yearling cattle; that plaintiff owned and was with the drove, and defendant charged him with stealing the cattle, and said he had a warrant for him, and would take him back; that plaintiff said he would rather settle it, and that on the next morning, they settled the matter, plaintiff giving defendant cattle to the value of \$200, and paying him in money the value of the two yearlings, which plaintiff kept. Soon afterwards defendant saw Gage, who told him of plaintiff's having driven off his cattle, and both expressed the opinion that

all was not right with plaintiff. Plaintiff afterwards brought actions against defendant for slander in charging him with stealing the cattle, and to recover the value of the cattle which defendant had received on the settlement. Thereafter defendant went before the grand jury, and an indictment was found against plaintiff, but, on trial thereof, after hearing witnesses on both sides, plaintiff was acquitted. Subsequently plaintiff brought this action. The judge found a verdict for plaintiff for \$250. Defendant moved for a new trial.

BRONSON, C. J. There was evidence enough in the case to warrant the jury in finding that the defendant set the prosecution in motion from a bad motive. But all the books agree that proof of express malice is not enough, without showing also the want of probable cause. "Probable cause" has been defined as a reasonable ground of suspicion, supported by circumstances sufficiently strong in themselves to warrant a cautious man in the belief that the person accused is guilty of the offense with which he is charged. *Munns v. Dupont de Nemours*, 3 Wash. C. C. 37, Fed. Cas. No. 9,926. However innocent the plaintiff may have been of the crime laid to his charge, it is enough for the defendant to show that he had reasonable grounds for believing him guilty at the time the charge was made. In *Swaim v. Stafford*, 25 N. C. 289, and *Id.*, 26 N. C. 392, the action was brought against the defendant, who was a merchant, for charging the plaintiff with stealing a piece of ribbon from his store. At the time the complaint was made the defendant had received such information as induced a belief of the plaintiff's guilt, and although it afterwards turned out that the property had not been taken by any one, and was never out of the defendant's possession, it was held that an action for malicious prosecution could not be supported. The doctrine that probable cause depends on the knowledge or information which the prosecutor had at the time the charge was made has been carried to a great length. In *Delegal v. Highley*, 3 Bing. N. C. 950, which was an action for maliciously, and without probable cause, procuring a third person to charge the plaintiff with the criminal offense, the defendant pleaded specially, showing that the plaintiff was guilty of the offense which had been laid to his charge; and the plea was held bad in substance, because it did not show that the defendant, at the time the charge was made, had been informed or knew the facts on which the charge rested. The question of probable cause does not turn on the actual guilt or innocence of the accused, but upon the belief of the prosecutor concerning such guilt or innocence. *Seibert v. Price*, 5 Watts & S. 438, 40 Am. Dec. 525. Without going into particular examination of the evidence in this case, it is enough to say that the defendant, at the time he went before the grand jury, had strong grounds for believing that the plaintiff had stolen the cattle, and, so far as appears, not a single fact had then come to his knowledge which was calculated to induce a different

opinion. Although the plaintiff was in fact innocent, there would be no color for this action, if it were not for the fact that the defendant settled the matter with the plaintiff, instead of proceeding against him for the supposed offense. If the parties intended the settlement should extend so far as to cover up and prevent a criminal prosecution, the defendant was guilty of compounding a felony. And the fact that he made no complaint until the plaintiff commenced the two suits against him goes far to show that he was obnoxious to that charge, and that he was governed more by his own interest than by a proper regard to the cause of public justice. But, however culpable the defendant may have been for neglecting his duty to the public, that cannot be made the foundation of a private action by the plaintiff. Although the defendant may have agreed not to prosecute, and the complaint may have been afterwards made from a malicious feeling towards the plaintiff, still the fact of probable cause remains; and, so long as it exists, it is a complete defense. There is enough in the defendant's conduct to induce a rigid scrutiny of the defense. But if upon such scrutiny it appears that he had reasonable grounds for believing the plaintiff guilty, and there is nothing to show that he did not actually entertain that belief, there is no principle upon which the action can be supported. On a careful examination of the case, I am of opinion that the verdict was clearly wrong. But, as the charge of the judge is not given, we must presume that the case was properly submitted to the jury, and a new trial can therefore only be had on payment of costs.

Ordered accordingly.

(The definition of "probable cause," which this case gives as taken from *Munns v. Dupont de Nemours*, 3 Wash. C. C. 37, Fed. Cas. No. 9,926, has been often approved and reiterated in subsequent cases. *Anderson v. How*, 116 N. Y. 336, 22 N. E. 695; *Mitchell v. Logan*, 172 Pa. 349, 33 Atl. 554; *Boyd v. Cross*, 35 Md. 194; *Miles v. Walker* [Neb.] 92 N. W. 1014. Some decisions, however, disapprove the use of the expression "cautious man" in the definition [since it may mean an overprudent or timorous man], and substitute for it "ordinarily prudent man." *McClafferty v. Philp*, 151 Pa. 86, 24 Atl. 1042; *Eggett v. Allen*, 106 Wis. 633, 82 N. W. 556. A definition often cited with approval is this: "Probable cause is such a state of facts in the mind of the prosecutor as would lead a man of ordinary caution and prudence to believe or entertain an honest and strong suspicion that the person accused is guilty." *Bacon v. Towne*, 4 Cush. 217; *Cohn v. Saidel*, 71 N. H. 558, 53 Atl. 800; *Eggett v. Allen*, 106 Wis. 633, 82 N. W. 556; *Vinal v. Core*, 18 W. Va. 1. Other definitions say "ordinarily prudent and careful man" [*Fox v. Smith* (R. I.) 55 Atl. 698; *Flam v. Lee*, 116 Iowa, 289, 90 N. W. 70, 93 Am. St. Rep. 242]; "reasonable and cautious person" [*Christian v. Hanna*, 58 Mo. App. 37]; "ordinarily prudent and cautious man" [*Hicks v. Faulkner*, 8 Q. B. D. 167, affirmed in 46 L. T. (N. S.) 12], etc. "A person," it is said, "who suspects another of having committed an offense is bound to verify his suspicions by such inquiry as reasonable care and prudence would suggest, under the circumstances of the particular case, before making a complaint." *Bechel v. Pacific Exp. Co.* [Neb.] 91 N. W. 853; *Miller v. Railroad Co.* [C. C.] 41 Fed. 898.

When the facts of the case are undisputed, either being admitted or otherwise established, the question whether there was probable cause is one of law

for the court. *Toth v. Greisen* [N. J. Sup.] 51 Atl. 927; *Crescent Live Stock Co. v. Butchers' Co.*, 120 U. S. 141, 7 Sup. Ct. 472, 30 L. Ed. 614; *Huckestein v. N. Y. Life Ins. Co.*, 205 Pa. 27, 54 Atl. 461; *Le Clear v. Perkins*, 103 Mich. 131, 61 N. W. 357, 26 L. R. A. 627; *Hazzard v. Flury*, 120 N. Y. 223, 24 N. E. 194. But when the facts are controverted and the evidence is conflicting, it is for the jury to decide what the real facts of the case are, but for the court to determine whether they do or do not amount to probable cause. *Mahaffey v. Byers*, 151 Pa. 92, 25 Atl. 93; *Boyd v. Cross*, 35 Md. 194; *Stubbs v. Mulholland*, 168 Mo. 47, 67 S. W. 650; *Bank of Miller v. Richmon*, 64 Neb. 111, 89 N. W. 627; *Heyne v. Blair*, 62 N. Y. 19; *Van v. Pacific Coast Co.* [C. C.] 120 Fed. 699. The jury may, in such cases, be instructed hypothetically, viz., that if they find the facts in a designated way, then such facts do or do not constitute probable cause. *Erb v. German Am. Ins. Co.*, 112 Iowa, 357, 83 N. W. 1053; *Stewart v. Sonneborn*, 98 U. S. 187, 25 L. Ed. 116; *Jones v. Wilmington & W. R. Co.*, 125 N. C. 227, 34 S. E. 398; *Boush v. Fidelity & Deposit Co.*, 100 Va. 735, 42 S. E. 877; *Maynard v. Sigman* [Neb.] 91 N. W. 576. The want of probable cause cannot be inferred from any degree of even express malice. *Cohn v. Saidel*, 71 N. H. 558, 53 Atl. 800; *Stewart v. Sonneborn*, 98 U. S. 187, 25 L. Ed. 116.)

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(53 N. Y. 14.)

#### CARL v. AYERS.

(Court of Appeals of New York. May 20. 1873.)

#### MALICIOUS PROSECUTION—ARREST ON MERE SUSPICION.

Although a person is justified in procuring the arrest of another on a criminal charge, where the apparent facts are such as would lead a discreet and prudent person to the belief that a crime had been committed by the person charged, a groundless suspicion, unwarranted by the conduct of the accused or by facts known to the accuser when the accusation is made, will not exempt the latter from liability to an innocent person for causing his arrest.

Appeal from Supreme Court, General Term, Second Department.

Action by Joseph Carl against George L. Ayers for malicious prosecution in causing the arrest and imprisonment of plaintiff on a charge of stealing or attempting to steal a diamond pin. The evidence given by plaintiff was in substance that, being on a steam-boat, on which were also defendant and his wife and children, and his attention being attracted by the severe coughing of one of the children, and intending to tell defendant of a remedy which he knew, he went to the place where they were sitting, and, being unable to approach defendant in front, stepped behind him, and touched him on the shoulder in order to attract his attention, and said he wished to speak with him; that defendant answered, "If you have anything to say, say it here;" that plaintiff was about to walk away, but turned, and explained to defendant that he merely wished to speak to him in regard to his child's sickness, to which defendant answered, "You never mind about my child; you mind your own business and I will mind mine;" that soon afterwards defendant pointed out plaintiff to a detective officer, and charged

plaintiff with larceny or attempt to steal defendant's diamond pin, and insisted on plaintiff's arrest; that plaintiff was arrested thereupon, in the presence of the passengers, about half an hour before the boat landed, and was afterwards taken to a station-house by the officer in company with defendant, and a charge of larceny from the person was preferred against him, on which he was imprisoned all night and, the following day being Sunday, until Monday morning; and that the justice before whom he was then brought, after hearing the testimony of defendant and his wife, discharged plaintiff. Plaintiff's complaint was dismissed by the trial judge, and judgment for defendant was entered thereon, which was affirmed by the general term on appeal. From the judgment of the general term plaintiff appealed.

ANDREWS, J. The court was not justified in nonsuiting the plaintiff if there was any evidence of the want of probable cause for causing his arrest and imprisonment, or unless the case, upon the whole proof, was such that a verdict for the plaintiff upon the issue would have been set aside by the court as against evidence. *Masten v. Deyo*, 2 Wend. 424; *Davis v. Hardy*, 6 Barn. & C. 225. If the evidence on the part of the plaintiff would have justified the jury in finding that the defendant acted without probable cause, then, although the proof on the part of the defendant tended to the opposite conclusion, the nonsuit was erroneously granted. There was no independent or conceded fact shown on the part of the defendant which, admitting the case made by the plaintiff, established the existence of probable cause. In considering the propriety of the nonsuit, the plaintiff is entitled to the concession that the facts existed as they appear in the evidence on his part; and upon these facts, aided by any fact favorable to the plaintiff proved by the defendant, the right of the court to nonsuit is to be determined. "Probable cause," which will justify a criminal accusation, is defined to be "a reasonable ground of suspicion, supported by circumstances sufficiently strong in themselves to warrant a cautious man in the belief that the person accused is guilty of the offense with which he is charged." *Munns v. Dupont de Nemours*, 3 Wash. C. C. 37, Fed. Cas. No. 9,926; *Foshay v. Ferguson*, 2 Denio, 617; *Bacon v. Towne*, 4 Cush. 218. It does not depend upon the guilt or innocence of the accused, or upon the fact whether a crime has been committed. *Baldwin v. Weed*, 17 Wend. 224; *Bacon v. Towne*, *supra*. A person making a criminal accusation may act upon appearances, and, if the apparent facts are such that a discreet and prudent person would be led to the belief that crime had been committed by the person charged, he will be justified, although it turns out that he was deceived, and that the party accused was innocent. Public policy requires that a person shall be protected who in good faith, and upon reasonable grounds, causes an arrest upon a criminal charge, and the law will not subject him to liability therefor. But a groundless suspicion, unwarranted by

the conduct of the accused, or by facts known to the accuser, when the accusation is made, will not exempt the latter from liability to an innocent person for damages for causing his arrest. A man has no right to put the criminal law in motion against another, and deprive him of his liberty, upon mere conjecture that he has been guilty of a crime. He cannot be allowed to put a false and unreasonable construction upon the conduct of another, and then justify himself for causing the arrest, by claiming that he acted upon appearances. The application of these familiar principles to the facts in this case leads to a reversal of the judgment. It is not claimed that any larceny was committed, and there was not upon the plaintiff's narration of the circumstances any ground for charging the plaintiff with an attempt to commit a larceny. The case, as made by the plaintiff, is this: While upon the boat his attention was attracted to the defendant's child by her severe coughing, and he went to the place where the defendant was sitting with his wife and child, to inform him of a remedy, and, not being able to pass in front of the defendant, he went behind him, and touched him once or twice on the shoulder to attract his attention, saying he wished to speak with him. He was roughly answered, and turned to leave, but turned back, and stated to the defendant that he intended to speak with him about his child, and the defendant again replied with great incivility, and soon afterwards caused the plaintiff to be arrested on the charge of an attempt to steal his diamond pin. The defendant wore a valuable pin in his shirt bosom, but it does not appear that the plaintiff saw it, nor had he touched the defendant's person, except when he put his hand upon his shoulder. Upon these facts, there was no reasonable ground to suspect that the plaintiff had a criminal motive. His conduct was neither unusual nor improper. There was no act of the plaintiff which could be construed as an attempt to commit a crime. If the defendant entertained a suspicion that the plaintiff designed to take his pin, it was not justified by the circumstances. The evidence on the part of the defendant materially conflicted with that of the plaintiff, but we can consider only the case made by the plaintiff, and we are of opinion that the evidence on his part disclosed a want of probable cause for the arrest, and that the nonsuit was improperly granted. The judgment should be reversed, and a new trial ordered, with costs to abide the event.

PECKHAM, RAPALLO, and FOLGER, JJ., concur. CHURCH, C. J., and GROVER and ALLEN, JJ., do not vote.

(For other good illustrations of a prosecution without probable cause, see *Wanser v. Wyckoff*, 9 Hun, 178; *Hazzard v. Flury*, 120 N. Y. 223, 24 N. E. 194; *Lacy v. Mitchell*, 23 Ind. 67.)

**Effect of advice of counsel.**

(25 Pa. 275.)

**WALTER v. SAMPLE (in part).**

(Supreme Court of Pennsylvania. 1855.)

**MALICIOUS PROSECUTION—PROBABLE CAUSE—ADVICE OF COUNSEL.**

In an action for malicious prosecution, defendant, to avail himself of the defense that he acted under professional advice, must show that he submitted all the facts which he knew were capable of proof fairly to his counsel, and that he acted bona fide on the advice given. He thus negatives, if not the malice, the want of probable cause; and he is not liable, even though the facts did not warrant the advice and the prosecution.

**Error to District Court, Allegheny County.**

Action on the case for malicious prosecution. At the trial, a member of the bar testified, on behalf of defendant, that the latter stated to him the facts of the case, and acted under his advice in instituting the alleged malicious prosecution. The court instructed the jury that "the opinion of private counsel cannot amount to proof of probable cause, unless the facts clearly warrant it, and were correctly stated." The jury found a verdict for plaintiff. Defendant assigned error in said instruction.

WOODWARD, J. This was an action on the case for malicious prosecution, and the only question presented by the record is whether the court were right in instructing the jury that "the opinion of private counsel cannot amount to proof of probable cause, unless the facts clearly warrant it, and were correctly stated." Ever since the case of *Farmer v. Darling*, 4 Burrows, 1971, it has been held that malice, either express or implied, and the want of probable cause, must both concur to support actions of this nature. The presumption of law is that every public prosecution is founded in probable cause, and the burden is therefore, in the first instance, on the plaintiff; but when he has submitted evidence of want of probable cause, or of circumstances from which a violent presumption would arise that it was wanting, the burden of proof is shifted onto the defendant, and then it is competent for him to show that he acted under professional advice. To make this defense available he must show that he submitted all the facts which he knew were capable of proof fairly to his counsel, and that he acted bona fide on the advice given. This proved, he negatives, if not the malice, the want of probable cause. I accede to the proposition, said Bayley, J., in *Ravenga v. Mackintosh*, 2 Barn. & C. 693, that if a party lays all the facts of his case fairly before counsel, and acts bona fide upon the opinion given by that counsel, (however erroneous that opinion may be,) he is not liable to an action of this description. See the

cases cited 2 Saund. Pl. & Ev. marg. pp. 659, 660. In *Sommer v. Wilt*, 4 Serg. & R. 24, Judge Duncan plainly intimated his opinion that such evidence would be a defense to the action, as negating the imputation of malice; and in the case of *Hall v. Smith*, reported in 7 Leg. Int. 7, the district court of Philadelphia treated such evidence as an answer to the imputation both of malice and want of probable cause, between which, it was said, there is no difference in the consideration of a matter of this kind. Professors of the law are the proper advisers of men in doubtful circumstances, and their advice, when fairly obtained, exempts the party who acts upon it from the imputation of proceeding maliciously and without probable cause. It may be erroneous, but the client is not responsible for the error. He is not the insurer of his lawyer. Whether the facts amount to probable cause is the very question submitted to counsel in such cases; and, when the client is instructed that they do, he has taken all the precaution demanded of a good citizen. To manifest the good faith of the party, it is important that he should resort to a professional adviser of competency and integrity. He is not to make such a resort "a mere cover for the prosecution;" but, when he has done his whole duty in the premises, he is not to be made liable because the facts did not clearly warrant the advice and prosecution. The testimony here was that Sample stated the facts of the case, and there is no suggestion on the record that they were not fairly stated. Suppression, evasion, or falsehood would make him liable; but if fairly submitted, and if the advice obtained was followed in good faith, he had a defense to the action, and the court should have given him the benefit of it.

The judgment is reversed, and a venire de novo awarded.

(This doctrine is well settled. *McClafferty v. Philp*, 151 Pa. 86, 24 Atl. 1042; *Black v. Buckingham*, 174 Mass. 102, 54 N. E. 494; *Magowan v. Rickey*, 64 N. J. Law, 402, 45 Atl. 804; *Maynard v. Sigman* [Neb.] 91 N. W. 576; *Perry v. Sulier*, 92 Mich. 72, 52 N. W. 788; *Neufeld v. Rodeminski*, 144 Ill. 83, 32 N. E. 913; *Messman v. Ihlenfeldt*, 89 Wis. 585, 62 N. W. 522; *Hall v. Suydam*, 6 Barb. 83; *White v. Carr*, 71 Me. 555, 36 Am. Rep. 533. Some of the cases, however, regard the advice of counsel as showing the existence of probable cause, while others treat it as bearing on the question whether there was malice [*Vinal v. Core*, 18 W. Va. 1; *Hazzard v. Flury*, 120 N. Y. 223, 24 N. E. 194]; and others still regard it as relating to both questions [*Folger v. Washburn*, 137 Mass. 60; *Le Clear v. Perkins*, 103 Mich. 131, 61 N. W. 357, 26 L. R. A. 627]. This last view seems the better one. If the client makes false statements to the lawyer, or does not make a full, fair, and frank disclosure of the facts of the case, or does not act in good faith upon the advice the lawyer gives him, such advice is no defense. *Miles v. Walker* [Neb.] 92 N. W. 1014; *Bell v. Atlantic City R. Co.*, 202 Pa. 178, 51 Atl. 600; and the cases *supra*. Some cases say that the lawyer must be "reputable and in good standing," in order that his advice may be a protection. *Roy v. Goings*, 112 Ill. 656; *Stubbs v. Mulholland*, 168 Mo. 47, 67 S. W. 650; *Williams v. Casebeer*, 126 Cal. 77, 58 Pac. 380. Advice obtained from a justice of the peace. It is generally held, is no defense [*Necker v. Bates*, 118 Iowa, 545, 92 N. W. 607:

Mauldin v. Ball, 104 Tenn. 597, 58 S. W. 248]; but the contrary rule is now applied in Massachusetts to her inferior magistrates, since they are now required to have a competent legal training [Monaghan v. Cox, 155 Mass. 487, 30 N. E. 467, 31 Am. St. Rep. 555].)

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## Termination of the proceeding.

(109 Mass. 158, 12 Am. Rep. 682.)

### CARDIVAL v. SMITH.

(Supreme Judicial Court of Massachusetts. January Term, 1872.)

#### MALICIOUS PROSECUTION—TERMINATION OF PROCEEDING.

Where the plaintiff in a civil action, after maliciously and without probable cause procuring the arrest of the defendant on the writ therein, fails to have the writ returned into the office of the clerk of the court, or to appear at the court to which the writ was returnable, there is a final determination of the action, such that the defendant may maintain an action for malicious prosecution.

#### Appeal from Superior Court.

Action of tort by Peter Cardinal against Joseph W. Smith, brought in the superior court by writ dated November 26, 1869. The declaration alleged that defendant maliciously, and without probable cause, procured the arrest of plaintiff on a writ returnable to the superior court at September term, 1869; that plaintiff "duly appeared at said court to which said writ was returnable, but that the defendant did not appear, well knowing that he had no probable cause to maintain the action against the plaintiff, nor was said writ ever returned into the office of the clerk of said court." Defendant demurred to the declaration on the ground that it appeared "that the said suit alleged to be malicious was not determined in favor of the defendant therein by a judgment of court." The superior court sustained the demurrer. Plaintiff appealed.

GRAY, J. The general rules of law governing actions for malicious arrest and prosecution have long been well settled. In the words of Lord Camden, "this is an action for bringing a suit at law; and courts will be cautious how they discourage men from suing. When a party has been maliciously sued, and held to bail, malice, and that it was without any probable cause, must be alleged and proved." *Goslin v. Wilcock*, 2 Wils. 302, 307. "The new action must not be brought before the first be determined, because till then it cannot appear that the first was unjust." Bull. N. P. 12. When the prosecution alleged to have been malicious is by complaint in behalf of the government for a crime, and, in pursuance thereof an indictment has been found and presented to a court having jurisdiction to try it, an acquittal by a jury must be shown, and a

nolle prosequi entered by the attorney for the government is not sufficient; for the finding of the grand jury is some evidence of probable cause, and another indictment may still be found on the same complaint. *Bull. N. P.* 14; *Bacon v. Towne*, 4 *Cush.* 217; *Parker v. Farley*, 10 *Cush.* 279; *Bacon v. Waters*, 2 *Allen*, 400. But if it is commenced by complaint to a magistrate who has jurisdiction only to bind over or discharge, his record, stating that the complainant withdrew his prosecution, and it was thereupon ordered that the accused be discharged, is equivalent to an acquittal. *Sayles v. Briggs*, 4 *Metc.* 421, 426. If the accused, after being arrested, is discharged by the grand jury's finding no indictment, that shows a legal end to the prosecution. *Jones v. Givin*, *Gilb.* 185, 220; *Bul-ler, J.*, in *Morgan v. Hughes*, 2 *Term R.* 225, 232; *Freeman v. Arkell*, 2 *Barn. & C.* 494, 3 *Dowl. & R.* 669; *Michell v. Williams*, 11 *Mees. & W.* 205; *Bacon v. Waters*, 2 *Allen*, 400. And if the prosecutor, after procuring the arrest, fails to enter any complaint, this, with the attending circumstances, is sufficient to be submitted to the jury as evidence of want of probable cause. *Venafr v. Johnson*, 10 *Bing.* 301, 3 *Moore & S.* 847, and 6 *Car. & P.* 50; *McDonald v. Rooke*, 2 *Bing. N. C.* 217, 2 *Scott*, 359.

When the suit complained of is a civil action, wholly under the control of the plaintiff therein, it would seem that a discharge thereof by him, without any judgment or verdict, is a sufficient termination of the suit; and that, for instance, if one maliciously causes another to be arrested and held to bail for a sum not due, or for more than is due, knowing that there is no probable cause, and, after entering his action, becomes nonsuit, or settles the case upon receiving part of the sum demanded, an action for a malicious prosecution may be maintained against him. *Nicholson v. Coghill*, 4 *Barn. & C.* 21, 6 *Dowl. & R.* 12; *Watkins v. Lee*, 5 *Mees. & W.* 270; *Ross v. Norman*, 5 *Exch.* 359; *Bicknell v. Dorion*, 16 *Pick.* 478, 487; *Savage v. Brewer*, *Id.* 453, 28 *Am. Dec.* 255. In *Arundell v. White*, 14 *East*, 216, it was held that an entry in the minute-book of the sheriff's court in London, opposite the entry of a suit in that court, that it was withdrawn by the plaintiff's order, was sufficient evidence of a termination of that suit to sustain an action for malicious prosecution. In *Pierce v. Street*, 3 *Barn. & Adol.* 397, the declaration, after setting out the suing out of a writ in an ordinary action at law against the plaintiff, and an arrest and holding to bail thereon, and alleging that it was done maliciously and without probable cause, averred that no proceedings were thereupon had in that action, and that the plaintiff therein did not declare against the defendant nor prosecute his suit against him with effect, but voluntarily permitted the action to be discontinued for want of prosecution thereof; whereupon and whereby, and according to the practice of the court, the suit became determined. At the trial of the action for malicious

arrest, it appeared that no declaration was delivered or filed in the former action, and that this action was not commenced until a year after the return-day of that. It was objected that, there being no judgment of court, there was no evidence of the determination of the suit to satisfy the averment in the declaration. But Lord Lyndhurst, C. B., thought there was, and overruled the objection; and his ruling was confirmed by the court of queen's bench, Lord Ten-terden, C. J., saying, "The length of time which had elapsed shows that the suit was abandoned altogether;" and Parke, J., "When the cause is out of court, it must be considered as determined." Our own statutes expressly provide that, if no declaration is inserted in the writ, or filed before or at the return term, it shall be a discontinuance of the action. Gen. St. c. 129, § 9. But the present case does not require us to consider what disposition must be shown of a civil action which has once been entered in court, in order to constitute a final determination thereof. A plaintiff cannot be compelled to enter his action, and, until he does, may judge for himself whether he will proceed with it or not. If he does not enter it, it never comes before the court, nor becomes the subject of any judgment, nor appears on its records, unless the defendant, upon filing a complaint at the return term, obtains judgment for his costs. If the defendant does not make such a complaint, the action is not the less finally abandoned and determined by the neglect of the plaintiff to proceed with it. *Clark v. Montague*, 1 Gray, 446, 448; *Lombard v. Oliver*, 5 Gray, 8; *Jewett v. Locke*, 6 Gray, 233. The only cause assigned for the demurrer being that the declaration shows no determination of the former suit in favor of the defendant therein by a judgment of court, it must be overruled.

(In *Clark v. Cleveland*, 6 Hill, 344, the rule is laid down that it is a sufficient termination of the proceeding, if "the particular prosecution be disposed of in such a manner that this cannot be revived, and the prosecutor must be put to a new one." This rule is satisfied, says the same case, if a bill of indictment is returned "Not found," or if a person accused of crime is discharged by a committing magistrate, or if in the case of a civil action the action is discontinued. The same general rule is also stated in *Robbins v. Robbins*, 133 N. Y. 597, 30 N. E. 977 [discharge by magistrate], and in *Apgar v. Woolston*, 43 N. J. Law, 57. The rule has been applied in cases of a discharge by a magistrate [*Jones v. Finch*, 84 Va. 207, 4 S. E. 342; *Waldron v. Sperry*, 53 W. Va. 116, 44 S. E. 283; *Brown v. Randall*, 36 Conn. 56, 4 Am. Rep. 35; *Bank of Miller v. Richmon*, 64 Neb. 111, 89 N. W. 627; *Rider v. Kite*, 61 N. J. Law, 8, 38 Atl. 754; *Moyle v. Drake*, 141 Mass. 238, 6 N. E. 520; *Mentel v. Hippely*, 165 Pa. 558, 30 Atl. 1021]; and in cases of an abandonment of the prosecution [*Page v. Citizens' Banking Co.*, 111 Ga. 73, 36 S. E. 418, 51 L. R. A. 463, 78 Am. St. Rep. 144; *Fay v. O'Neill*, 36 N. Y. 11]; and so where the grand jury refuses to find an indictment [*Potter v. Casterline*, 41 N. J. Law, 22]; but when a prosecution is ended by means of a compromise, this is not a sufficient termination to allow an action for malicious prosecution [*Russell v. Morgan* (R. I.) 52 Atl. 809; *Craig v. Ginn*, 3 Pennewill, 117, 48 Atl. 192, 53 L. R. A. 715, 94 Am. St. Rep. 77 (citing many cases); *Gallagher v. Stoddard*, 47 Hun, 101].)

(66 N. H. 375, 22 Atl. 456.)

## WOODMAN v. PRESCOTT.

(Supreme Court of New Hampshire. Rockingham. March 13, 1891.)

## ENTRY OF NOLLE PROSEQUI—EFFECT OF AS TERMINATION OF PROSECUTION.

The entry of a nolle prosequi in a criminal case is a sufficient termination of the proceeding to entitle the accused to maintain an action for malicious prosecution.

Exceptions from Rockingham County; before Justice A. P. Carpenter.

Action by James K. Woodman against Samuel Prescott for malicious prosecution. Judgment for plaintiff. Defendant brings exceptions. Exceptions overruled.

At the October term, 1885, the grand jury, on the complaint of the defendant, returned an indictment against the plaintiff for larceny, (under Gen. Laws, c. 278, § 11,) alleged to have been committed, and which was committed, if at all, in March, 1880. A nolle prosequi was entered at the October term, 1886. The plaintiff has always resided in this state. There was evidence tending to show that the defendant had no knowledge of the facts on which the prosecution was founded until 1885, and that the nolle prosequi was entered because Prescott did not receive notice of the time fixed for the trial in season to procure the attendance of the witnesses for the state, but the plaintiff claimed the fact to be otherwise. At the close of the plaintiff's argument to the jury the defendant requested the court to rule that the entering of a nolle prosequi was not a sufficient termination of the prosecution to entitle the plaintiff to maintain the action. The court denied the request, and the defendant excepted

CLARK, J. To maintain an action for malicious prosecution, the plaintiff must show that the proceeding complained of as malicious was instituted without probable cause, and is ended. "The new action must not be brought before the first be determined, because till then it cannot appear that the first was unjust." Bull. N. P. 12. If the first action is still pending, or if there has been a judgment against the plaintiff, or if he has terminated the suit by paying what was demanded, (unless the payment was made under duress, *Morton v. Young*, 55 Me. 24, 92 Am. Dec. 565,) or by compromise, he cannot be admitted to say that the action was commenced without probable cause, and consequently cannot have an action for malicious prosecution. If there has been a judgment in the plaintiff's favor, or the nature of the proceeding was such that he had no opportunity to make a contest and obtain a decision in his favor, as where one maliciously causes another to be arrested and held to bail in a civil

action, and fails to enter the action, (*Cardinal v. Smith*, 109 Mass. 158, 12 Am. Rep. 682,) he may bring an action for malicious prosecution. Whether the entry of *nolle prosequi* is a sufficient termination of a criminal suit to allow the party prosecuted to commence an action for malicious prosecution is a question upon which the authorities are not uniform. In Massachusetts it is held that such an entry is not necessarily sufficient, and it is said "that whether a prosecution has been so terminated as to authorize the party prosecuted to commence an action for malicious prosecution is to be determined by the facts of the particular case, of which facts the entry of *nolle prosequi* may be one of several, may be the only fact, may be a controlling fact, or may be an entirely unimportant one." *Graves v. Dawson*, 130 Mass. 78, 39 Am. Rep. 429. In *Langford v. Railroad Co.*, 144 Mass. 431, 11 N. E. 697, *Morton, C. J.*, says: "The entry of a *nolle prosequi* by the district attorney of his own motion, followed by a discharge of the accused party by the court, may be such a termination of the prosecution as will enable the party to maintain an action for malicious prosecution." And it is held that a discharge by a magistrate having only authority to bind over is a sufficient termination of the proceedings. *Moyle v. Drake*, 141 Mass. 238, 242, 6 N. E. 520. In other jurisdictions the entry of a *nolle prosequi* is held to be sufficient. *Stanton v. Hart*, 27 Mich. 539; *Hatch v. Cohen*, 84 N. C. 602, 37 Am. Rep. 630; *Brown v. Randall*, 36 Conn. 56, 4 Am. Rep. 35; *Apgar v. Woolston*, 43 N. J. Law, 57. In the latter case it is said: "No action for a malicious prosecution can be brought while the criminal proceedings are pending. When the criminal prosecution is ended, if it terminates in favor of the accused, he may then maintain his action for a malicious prosecution. Except to confer on the accused the capacity to sue, the manner in which the prosecution terminated is immaterial. The law requires only that the particular prosecution complained of shall have been terminated, and not that the liability of the plaintiff to prosecution for the same offense shall have been extinguished, before the action for malicious prosecution is brought. Consequently the refusal of the grand jury to find an indictment, a *nolle prosequi*, or any proceeding by which the particular prosecution is disposed of, in such a manner that it cannot be revived, and that the prosecutor, if he intends to proceed further, must institute proceedings *de novo*, is a sufficient termination of the prosecution to enable the plaintiff to bring his action." So, also, Judge Cooley says: "The reasonable rule seems to be that the technical prerequisite is only that the particular prosecution be disposed of in such a manner that this cannot be revived, and the prosecutor, if he proceeds further, will be put to a new one." Cooley, *Torts*, 186, citing *Clark v. Cleveland*, 6 Hill, 344, 347; *Cardinal v. Smith*, 109 Mass. 159, 12 Am. Rep. 682; *Driggs v. Burton*, 44 Vt. 124; *Leever v. Hamill*, 57 Ind. 423. The rule supported by reason

and authority seems to be that if the proceeding has been terminated in the plaintiff's favor, without procurement or compromise on his part, in such a manner that it cannot be revived, it is a sufficient termination to enable him to bring an action for a malicious prosecution.

Exceptions overruled.

CARPENTER, J., did not sit. The others concurred.

(The following cases hold that a *nolle prosequi* is not a sufficient termination: Garing v. Fraser, 76 Me. 37; Ward v. Reasor, 98 Va. 399, 36 S. E. 470. To the contrary are Murphy v. Moore [Pa.] 11 Atl. 665; Woodworth v. Mills, 61 Wis. 44, 20 N. W. 728, 50 Am. Rep. 135; Moulton v. Beecher, 1 Abb. N. C. 193. In Lowe v. Wartman, 47 N. J. Law, 413, 1 Atl. 489, it is said that a criminal prosecution may be said to have terminated, [1] where there is a verdict of not guilty; [2] where the grand jury ignores a bill; [3] where a *nolle prosequi* is entered; [4] where the accused has been discharged from bail or imprisonment.

A final judgment for the defendant in the prosecution alleged to have been malicious is a sufficient termination, even though there may be a right of appeal. Luby v. Bennett, 111 Wis. 313, 87 N. W. 804, 56 L. R. A. 261, 87 Am. St. Rep. 897. *It seems*, however, that an appeal from the judgment may furnish a reason for staying the trial of the action for malicious prosecution until the decision of the appeal. Marks v. Townsend, 97 N. Y. 590.)

## Malicious prosecution of a civil action — Different doctrines.

(175 Ill. 619, 51 N. E. 569, 67 Am. St. Rep. 242.)

SMITH v. MICHIGAN BUGGY CO. (in part).

(Supreme Court of Illinois. Oct. 24, 1898.)

### MALICIOUS PROSECUTION OF CIVIL ACTION.

An action will not lie for the malicious prosecution of a civil action without probable cause, where the process in such suit was by summons only, and not accompanied by arrest of the person, or seizure of his property, or other special injury not necessarily resulting in all suits prosecuted to recover for like causes of action.

Error to Appellate Court, First District.

Trespass on the case by Alfred A. Smith against the Michigan Buggy Company to recover damages for the alleged malicious prosecution of an ordinary civil action without probable cause by the defendant against the plaintiff. From a judgment of the appellate court (66 Ill. App. 516) affirming a judgment for defendant, plaintiff brings error. Affirmed.

MAGRUDER, J. The suit which was begun by the defendant in error against the plaintiff in error in Michigan was an ordinary

civil suit, and resulted in favor of plaintiff in error. It is alleged in the declaration in the case at bar that the suit in Michigan was a malicious prosecution, and without probable cause; but it is not alleged or claimed that in that suit the plaintiff in error was arrested, or that any of his property was seized, nor does it appear that the plaintiff in error therein suffered any special damage, over and above the ordinary expenses and trouble which are attendant upon the defense of an ordinary civil suit. The question, therefore, which is presented in this case, and the only question which we deem it necessary to consider, is whether damages can be recovered for the malicious prosecution without probable cause of an ordinary civil suit, begun by personal service of process, and unaccompanied either by an arrest of the person or by seizure of property. It is well settled that malicious prosecution is a proper action for the recovery of damages for the institution of a civil suit with malice and without probable cause, where the defendant is deprived of his personal liberty, or where there is an attachment or seizure of his property. But whether malicious prosecution will lie in such case in the absence of any interference with personal liberty, and in the absence of any seizure of property, is a question upon which the authorities are very much divided. The question above indicated has never been squarely decided in any case that has come before this court. In *Gorton v. Brown*, 27 Ill. 489, 81 Am. Dec. 245, it was held that an action could not be maintained for maliciously suing out a writ of injunction. The conclusion reached in that case, however, was based mainly upon the ground that the party had a sufficient remedy upon the injunction bond given when the injunction was obtained, and that such bond was designed by the statute to cover the damages suffered by the party enjoined. But the drift of the opinion in that case was against the maintenance of an action for malicious prosecution without probable cause of an ordinary civil suit, unaccompanied by arrest or seizure of property. In *Gorton v. Brown*, supra, we said (page 493, 27 Ill., 81 Am. Dec. 245): "We are well aware that elementary writers and respectable courts have held that an action on the case will lie for an abuse of the process of the courts, where special damages are alleged, and against a party for prosecuting a causeless action, prompted by malice, by which the defendant has sustained some injury, for which he has no other recourse or remedy. Such actions, however, for the most part, are actions wherein arrests have been made, and bail demanded, or the party put to some other expense and inconvenience, which cannot be compensated in any other mode than by an action. Such actions, except where a malicious arrest is charged, are not favored by the courts, and ought not to be; for, in a litigious community, every successful defendant would bring his action for a malicious prosecution, and the dockets of the courts would be crowded with such

suits." The question here under consideration has been much discussed of late years in legal periodicals and in text-books, as well as in judicial decisions rendered by the courts in many of the states. We have examined the discussions upon this subject with great care, and are inclined to hold in accordance with the intimation made in *Gorton v. Brown*, supra, that such actions ought not to be maintained.

An able discussion of this subject, and an extensive review of the authorities in relation thereto down to the year 1878, may be found in 21 Amer. Law Reg. pp. 281, 353. The articles there published were written by Mr. John B. Lawson. After his review of the cases, Mr. Lawson announces it as his own opinion "that, while the weight of authority denies the action, the weight of reason allows it." The conclusion announced by the author of these articles has been followed by courts of last resort in several of the western and newly-created states. But, as the weight of authority denies the action, we, as a court, feel it our duty to be governed by the weight of authority, rather than by the conclusion of any law writer, however able and ingenious his reasoning may be. The learned author of the article on "Malicious Prosecution" in 14 Am. & Eng. Enc. Law, beginning on page 32, also refers to and states the substance of the cases on both sides of the question. It is there said: "At common law the defendant in an action maliciously brought without probable cause has a right of action against the plaintiff in such action after its termination in favor of such defendant, and this regardless of whether the plaintiff had interfered with either the person or property of the defendant. But, after the enactment of the statute of Marlbridge, in the fifty-second year of Henry III., giving costs to successful defendants by way of damage against the plaintiff pro falso clamore, it came to be held that an action for malicious prosecution would not lie in civil actions, unless in cases where there had been arrest of the person, or seizure of property, or other special injury, which would not necessarily result in all suits prosecuted to recover for like causes of action. And this is the rule adopted by some of the courts of this country. The contrary rule, adopted by courts equal in number and respectability, is that an action can be maintained, where neither the person nor the property was seized, for damages accruing in suits brought maliciously and without probable cause." We prefer to adopt, as the sounder rule, the rule first stated in the passage last above quoted. We are of the opinion, and so hold, that an action for the malicious prosecution of a civil suit without probable cause will not lie where the process in the suit so prosecuted is by summons only, and is not accompanied by arrest of the person, or seizure of the property, or other special injury not necessarily resulting in all suits prosecuted to recover for like causes of action. This conclusion is sustained by the following authorities, to wit: *Potts v. Imlay*, 4 N. J. Law, 330, 7 Am. Dec.

603; *Bitz v. Meyer*, 40 N. J. Law, 252, 29 Am. Rep. 233; *Muldoon v. Rickey*, 103 Pa. 110, 49 Am. Rep. 117; *Kramer v. Stock*, 10 Watts, 115; *Eberly v. Rupp*, 90 Pa. 259; *Mayer v. Walter*, 64 Pa. 283; *Wetmore v. Mellinger*, 64 Iowa, 741, 18 N. W. 870, 52 Am. Rep. 465; *Smith v. Hintrager*, 67 Iowa, 109, 24 N. W. 744; *McNamee v. Minke*, 49 Md. 122; *Supreme Lodge v. Unverzagt*, 76 Md. 104, 24 Atl. 323; *Terry v. Davis*, 114 N. C. 31, 18 S. E. 943; *Ely v. Davis*, 111 N. C. 24, 15 S. E. 878; *Mitchell v. Railroad Co.*, 75 Ga. 398; *Newell*, Mal. Pros. § 32. Those who favor the doctrine that the courts ought to permit suits of this character to be brought and prosecuted urge in support of it the common-law maxim that for every wrong the law furnishes a remedy. It is said that, when a civil suit is maliciously prosecuted without probable cause, the defendant undergoes expenses, and suffers injury from loss of time, and often from loss of credit, and that these wrongs he must endure without a remedy, if he cannot bring suit for damages for the prosecution of such malicious action. On the other hand, it must be remembered that the courts are open to every citizen; and every man has a right to come into a court of justice, and claim what he deems to be his right, without fear of being prosecuted for heavy damages. If such actions are allowed, it might oftentimes happen that an honest suitor would be deterred from ascertaining his legal rights, through fear of being obliged to defend a subsequent suit charging him with malicious prosecution.

It is urged that the costs which are awarded to the successful defendant in a civil suit, malicious in its character, and brought against him without probable cause, are inadequate compensation for the injury which he suffers. But the question of the amount of costs which are to be allowed the successful party is a question to be determined by the legislature, and not by the courts. As was said by Chief Justice Kirkpatrick in *Potts v. Imlay*, *supra*: "The courts of law are open to every citizen, and he may sue toties quoties upon the penalty of lawful costs only. These are considered as a sufficient compensation for the mere expenses of the defendant in his defense. They are given to him for this purpose, and he cannot rise up in a court of justice, and say the legislature has not given him enough. If we were legislators, indeed, perhaps we should be inclined to say that the costs, in all cases where costs are given, should completely indemnify the party for all his necessary expenses, both of time and money; but those to whom this high trust is committed in this state have thought, and, we will presume, have wisely thought, otherwise." Such ordinary trouble and expense as arise from the ordinary forms of legal controversy should be endured by the law-abiding citizen as one of the inevitable burdens which men must sustain under civil government. *Muldoon v. Rickey*, *supra*.

Those who favor this species of action also claim that, if the courts refuse to allow such actions to be maintained, litigation will be encouraged, and causeless and unfounded civil suits will be apt to be brought. On the contrary, the danger is that litigation will be promoted and encouraged by permitting such suits as the present action to be brought. This is so, because the conclusion of one suit would be but the beginning of another. A defendant who had secured a favorable result in the suit against him would be tempted to bring another suit for the purpose of showing that there had been malice and want of probable cause in the prosecution of the first suit which he had won. Litigation would thus become interminable. Every unsuccessful action would be apt to be followed by another alleging malice in the prosecution of the former action. There would thus be substantially a trial of every lawsuit twice instead of once, because, in order to show that the first suit was malicious and without probable cause, it would be necessary to go over again the material facts that had been developed by the proof in such suit. Again, if every successful defendant should be encouraged to bring an action against the defeated plaintiff for the malicious prosecution without probable cause of an ordinary civil suit, such defendant would be careless and extravagant in the matter of the cost of the defense made by him. It would be a matter of little importance to the successful defendant whether his contract with his attorney for the latter's professional services provided for extravagant or reasonable fees, if he could turn around at once and recover from the defeated plaintiff whatever he had expended. His expenses and trouble and loss of time and credit would assume larger proportions, and would be regarded as heavier burdens, if he knew that he was to be reimbursed for such outlay from the property of his adversary. In addition to this, there is no reason why a plaintiff may not bring an action against a defendant who has made a groundless and causeless defense, if the defendant may sue for damages which he has suffered for an unfounded prosecution. For the reasons stated, we are of the opinion that the court below committed no error in instructing the jury to find for the defendant below (the defendant in error here). Accordingly the judgment of the appellate court, affirming the judgment of the circuit court, is affirmed. Judgment affirmed.

(The states of this country are about equally divided on this question. Recent cases in accord with the above decision are *Bonney v. King*, 201 Ill. 47, 66 N. E. 377; *Muldoon v. Rickey*, 103 Pa. 110, 49 Am. Rep. 117; *Paul v. Fargo*, 84 App. Div. 9, 82 N. Y. Supp. 369; cf. *Willard v. Holmes*, 142 N. Y. 492, 37 N. E. 480. Numerous other decisions to the same effect are cited in the next case, post, p. 285.)

(114 Fed. 377.)

**WADE v. NATIONAL BANK OF COMMERCE OF TACOMA et al.**

(Circuit Court, D. Washington, W. D. March 21, 1902.)

**MALICIOUS PROSECUTION OF CIVIL ACTION.**

Action will lie to recover for injuries to reputation and business caused by malicious prosecution of a civil action without probable cause, in which a complaint was filed containing false and defamatory matter, though there has been no arrest or detention of the plaintiff, nor seizure of or interference with his property by any form of process.

At Law. Action to recover damages for alleged malicious prosecution of a civil action, in which the pleadings contained slanderous accusations, injurious to the present plaintiff. Demurrer to complaint overruled.

HANFORD, District Judge. The demurrer to the complaint in this case raises the question whether an action can be maintained to recover damages for injuries to the plaintiff's reputation and business caused by the malicious prosecution of a civil action without probable cause, in which a complaint was filed containing false and defamatory matter; there having been in said action no arrest or detention of the plaintiff, nor seizure of or interference with his property by any form of process. Upon the argument the demurrer was well supported by citations from text-books and adjudged cases. Some of the authorities hold that it is contrary to public policy to permit litigants to reverse their positions, and consume the time of the courts in a mere prolongation of disputes which have been once adjudicated. Others maintain that the taxable costs recovered by a defendant in an action is the legal measure of compensation which he may claim for whatever injuries he may have suffered by being compelled to appear in court and defend an action prosecuted wrongfully; and others hold that the courts of justice must be kept open and free to all who may invoke their protection, and that a plaintiff who submits his controversy for adjudication to a lawfully constituted tribunal should not be subjected to the peril of being sued for damages if he fails to secure a judgment in his favor. By other authorities the rule is established that the allegations of a pleading which are relevant to the issue are privileged, in the sense that, although defamatory and false, an injured person cannot maintain an action to recover compensation for any injury caused thereby. On these several grounds, and upon the authorities referred to, the defendants contend that this action cannot be maintained. For the sake of brevity I will give only a list of authorities cited, without arranging them with reference to the several propositions supported, or commenting thereon: *Wetmore v. Mellinger*, 64 Iowa, 741, 18 N.

W. 870, 52 Am. Rep. 465; *McNamee v. Minke*, 49 Md. 133; *Supreme Lodge v. Unverzagt*, 76 Md. 104, 24 Atl. 323; *Smith v. Buggy Co.*, 175 Ill. 619, 51 N. E. 569, 67 Am. St. Rep. 242; *Tribune Co. v. Bruck*, 61 Ohio St. 489, 56 N. E. 198, 76 Am. St. Rep. 433; *Terry v. Davis*, 114 N. C. 31, 18 S. E. 943; *Ely v. Davis*, 111 N. C. 24, 15 S. E. 878; *Mayer v. Walter*, 64 Pa. 283; *Mitchell v. Railroad Co.*, 75 Ga. 398; *Bitz v. Meyer*, 40 N. J. Law, 252, 29 Am. Rep. 233; *Potts v. Imlay*, 4 N. J. Law, 377, 7 Am. Dec. 603; *Rice v. Day*, 34 Neb. 100, 51 N. W. 464; *Commerce Co. v. Levi*, 21 Tex. Civ. App. 109, 50 S. W. 606; *Biering v. Bank*, 69 Tex. 599, 7 S. W. 90; *Johnson v. King*, 64 Tex. 226; *Tunstall v. Clifton* (Tex. Civ. App.) 49 S. W. 244; *Eberly v. Ruff*, 90 Pa. 259, 1 Am. Lead. Cas. (4th Ed.) 210; *Willard v. Holmes, Brook & Haydens Co.*, 142 N. Y. 492, 37 N. E. 480; *Cooley, Torts* (1st Ed.) 188, 189; *Id.* (2d Ed.) 217, 220; *Crockery Co. v. Haley*, 6 Wash. 302, 33 Pac. 650, 36 Am. St. Rep. 156; *Abbott v. Bank*, 20 Wash. 552, 56 Pac. 376; *Id.*, 175 U. S. 409, 20 Sup. Ct. 153, 44 L. Ed. 217; *Ray v. Law*, Fed. Cas. No. 11,592; *Luby v. Bennett*, 111 Wis. 613, 87 N. W. 804, 56 L. R. A. 261, 87 Am. St. Rep. 897.

The defendant also contended that, if the action can be maintained, the recovery must be limited to the amount of the actual pecuniary loss, in the way of expenses necessarily incurred in defending the former suit, over and above the taxable costs (*Closson v. Staples*, 42 Vt. 209, 1 Am. Rep. 316; *Eastin v. Bank*, 66 Cal. 123, 4 Pac. 1106, 56 Am. Rep. 77; *Brown v. City of Cape Girardeau*, 90 Mo. 377, 2 S. W. 302, 59 Am. Rep. 28; 19 Am. & Eng. Enc. Law [2d Ed.] 652), and that as the complaint alleges expenditures amounting to only \$500, and no greater sum can be recovered in any event, the amount involved is not sufficient to make a case cognizable in this court.

On the main question,—as to whether the action will lie to recover damages for injury to reputation and business prospects, there is a conflict of authorities; and, as the point has not been decided by an appellate court having jurisdiction to review the decisions of this court, it is necessary to consider the reasons as well as the authorities. The common law of England, so far as it is applicable to existing conditions in this country, furnishes the rule of decision for the courts in this state; and by the ancient common law cases of this nature were controlled by the elementary principle that a wrongful act causing injury entitled the injured party to compensation in money, and there was no rule barring such an action as this on any theory that the rights of an individual may be sacrificed out of regard for public policy or convenience, or any notion that the prosecution of an action in bad faith, and for the mere purpose of inflicting an injury, is a matter of right or privilege. The first departure from this rule of the common law has been traced to an English statute, referred to in the books as the "Statute of Marl-

bridge" (52 Hen. III.), which gave a successful defendant the right to recover damages as well as costs in the original action. 19 Am. & Eng. Enc. Law (2d Ed.) 652. There being no statute or rule of practice in this state by which a defendant can claim damages for malicious prosecution without bringing an independent action, we are not required to blindly follow English decisions based upon the statute of Marlbridge. All the arguments which may be drawn from the public policy idea, and from consideration of the evil consequences which may result from making one lawsuit the foundation for another, are proper only for consideration of the legislature. The courts are not authorized to create rules changing the law and denying substantial rights for any such reasons. The gravamen of the wrong charged against the defendants is their bad faith, in misusing judicial process, intentionally, to oppress and injure the plaintiff; and I am unable to accept as a right principle the proposition that to employ the judicial power of the government as an instrument to inflict a wanton injury is any man's privilege. It is my opinion that the true doctrine is affirmed in the text-books and decisions denying that a case such as this must be excepted from the general rule making a wrongdoer liable for damages to a party suffering injury as a consequence of his wrongful act. See *Cooper v. Armour* (C. C.) 42 Fed. 215, 8 L. R. A. 47, and cases therein cited; *Newell, Mal. Pros.* §§ 23, 24, 26, 28; *Eastin v. Bank*, 66 Cal. 123, 4 Pac. 1106; *Machine Co. v. Willan*, 63 Neb. 391, 88 N. W. 497, 56 L. R. A. 338, 93 Am. St. Rep. 449; *Kolka v. Jones*, 6 N. D. 461, 71 N. W. 558, 66 Am. St. Rep. 615.

Demurrer overruled.

(The following cases support this doctrine: *McCardle v. McGinley*, 86 Ind. 538, 44 Am. Rep. 343; *Brand v. Hinchman*, 68 Mich. 590, 36 N. W. 664, 13 Am. St. Rep. 362; *Eickhoff v. Fidelity Co.*, 74 Minn. 139, 76 N. W. 1030; *Whipple v. Fuller*, 11 Conn. 582, 29 Am. Dec. 330; *Smith v. Burrus*, 106 Mo. 94, 16 S. W. 881, 13 L. R. A. 59, 27 Am. St. Rep. 329.)

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### Malicious attachment in civil action.

(154 Mass. 1, 27 N. E. 772, 12 L. R. A. 288.)

#### ZINN v. RICE.

(Supreme Judicial Court of Massachusetts. Suffolk. May 20, 1891.)

#### WRONGFUL ATTACHMENT—TERMINATION OF ACTION NOT NECESSARY.

An action for maliciously suing out an excessive attachment may be brought before the termination of the attachment suit, and even though the plaintiff in said suit has a good cause of action, and there is no defense thereto, and the suit could not terminate in favor of defendant

therein. The grievance is that said plaintiff, having a just cause of action, made an excessive attachment of property, not for the purpose of securing his debt, but for the purpose of injuring said defendant.

Exceptions from Superior Court, Suffolk County; John Lathrop, Judge.

Action for maliciously suing out an excessive attachment. Plaintiff was nonsuited on the ground that his action was prematurely brought, and excepts. Exceptions sustained.

W. ALLEN, J. It is not contended that the facts alleged in the declaration, and offered to be proved at the trial, are not sufficient to sustain an action by the plaintiff against the defendant. The defendant's contention is that the action is prematurely brought; that it is an action for malicious prosecution, and subject to the rule that a suit for malicious prosecution cannot be maintained until the prosecution has terminated in favor of the plaintiff. But the rule applies only to suits for maliciously instituting groundless prosecutions, and does not apply to the injurious and malicious use of process in proceedings which were commenced with probable cause. The latter, being for the malicious use of legal process by acts authorized by its terms, may be called "actions for malicious prosecution," to distinguish them from actions for the abuse of process by doing under color of legal process acts not authorized by it; but there is no rule of law that in such an action the termination of any former suit must be shown. The rule is founded on the necessity of proving that a prosecution which itself puts in issue the truth of the charge on which it is founded is without probable cause. A defendant in such an action cannot bring another action to try the issue tendered him in the first while that issue is pending. The rule is, by its terms and nature, limited to a prosecution to establish a charge or cause of action, and cannot include an *ex parte* use of process incidental and collateral to such a prosecution, and in defense to which falsity of the charge cannot be shown. *Parker v. Langly*, 10 Mod. 209; *Fortman v. Rottier*, 8 Ohio St. 548, 70 Am. Dec. 606; *Bump v. Betts*, 19 Wend. 421; *Barnett v. Reed*, 51 Pa. 190, 88 Am. Dec. 574; *Jenings v. Florence*, 2 C. B. (N. S.) 467; *Churchill v. Siggers*, 3 El. & Bl. 929; *Wentworth v. Bullen*, 9 Barn. & C. 840; *Wood v. Graves*, 144 Mass. 365, 11 N. E. 567, 59 Am. Rep. 95; *Everett v. Henderson*, 146 Mass. 89, 14 N. E. 932, 4 Am. St. Rep. 284; *Savage v. Brewer*, 16 Pick. 453, 28 Am. Dec. 255; *Bicknell v. Dorion*, 16 Pick. 478. In the case at bar the grievance of the plaintiff is not that the defendant maliciously commenced a groundless suit. He admits that the plaintiff had a good cause of action, and that there is no defense to the suit, and that its termination cannot be in his favor. Nor is his grievance that the defendant abused the process in the former suit, and, under color of it, did

things not authorized by its terms. His grievance is that the defendant, having a just cause of action, and a legal suit against this plaintiff, made an excessive attachment of property, which he knew was not needed for the security of his debt, not for the purpose of securing his debt, but for the purpose of injuring the plaintiff. If the plaintiff has any right of action, which is not controverted, it is idle to say that he must wait until the former action has terminated in his favor.

The defendant contends that the amount of the debt must be fixed by the determination of the former suit, and that it cannot be shown in this suit. We know of no authority or reason for this. The amount of the debt cannot exceed the amount declared for in the suit, and that is admitted to be due, so far certainly as affects this suit. Beyond that there is no question in the former suit, and no issue, and the proceedings complained of were *ex parte*, and they were terminated by the reduction of the attachment. It is argued that the plaintiff in that suit may amend his declaration, and introduce a new cause of action. That case, as stated by the plaintiff himself, does not present any issue involved in the case at bar, and the possibility that a new cause of action may be added, if it existed, would not be sufficient to show that the issues presented in this case are pending in that, or to bring it within the terms or reason of the rule that the liability of this plaintiff to such possible cause of action can be tried only in that action. Exceptions sustained.

(See also *Alsop v. Lidden*, 130 Ala. 548, 30 South. 401; *Talbott v. Great Western Plaster Co.*, 86 Mo. App. 558; *LeClear v. Perkins*, 103 Mich. 131, 61 N. W. 357, 26 L. R. A. 627. The same rule applies in cases where an *ex parte* order or warrant of arrest is obtained. *Mayer v. Walter*, 64 Pa. 283; *Hyde v. Greuch*, 62 Md. 577; *Steward v. Gromett*, 7 C. B. [N. S.] 191.)

## Malicious abuse of process.

(4 Bing. N. C. 212.)

GRAINGER v. HILL et al.

(Court of Common Pleas. January 20, 1838.)

### 1. ABUSE OF PROCESS—ARREST.

Sheriff's officers, having a writ for the arrest of plaintiff in an action brought by defendants against him, came to plaintiff, who was ill in bed, and told him that, unless he would deliver up a certain document or find bail, they must either take him or leave a man with him. *Held*, that this was a sufficient restraint on plaintiff's person, without actual contact, to amount to an arrest, which would sustain an action by plaintiff for a malicious abuse of the process; and that defendants, having repaid to plaintiff, on a settlement between them, the caption fee charged to him by the officers, thereby admitted the propriety of such charge.

**2. SAME—TERMINATION OF PROCEEDING—WANT OF PROBABLE CAUSE.**

In an action for abusing the process of the court in order illegally to compel a party to give up his property, it is not necessary to prove that the action in which the process was improperly employed has been determined, or to aver that the process was sued out without reasonable or probable cause.

Motions for entry of nonsuit instead of verdict for plaintiff, and in arrest of judgment.

Action on the case by Grainger against Hill and another. Defendants pleaded the general issue. At the trial it appeared that in September, 1836, plaintiff, by deed, mortgaged to defendants for £80, being money loaned by them to him, a vessel of which he was owner and master. The money was to be repaid in September, 1837; and plaintiff was to retain the register of the vessel in order to pursue his voyages. In November, 1836, defendants, under some apprehension as to the sufficiency of their security, resolved to possess themselves of the ship's register; and for this purpose, after threatening to arrest the plaintiff unless he paid the money, they made an affidavit of debt, sued out a *capias* indorsed for bail in the sum of £95. 17s. 6d. in an action of *assumpsit*, and sent two sheriff's officers with the writ to plaintiff, who was lying ill in bed from the effects of a wound. A surgeon present perceiving he could not be removed, one of the defendants said to the sheriff's officers, "Don't take him away; leave the young man with him." The officers then told plaintiff they had not come to take him, but to get the ship's register; but that if he failed to deliver the register, or to find bail, they must either take him or leave one of the officers with him. Plaintiff, being unable to procure bail, and being much alarmed, gave up the register. Plaintiff afterwards came to an arrangement with defendants; was discharged from the arrest; repaid the money borrowed on mortgage; and received from defendants a release of the mortgage deed. No further steps were taken in the action of *assumpsit*. Upon this arrangement, a caption fee which had been charged and paid by plaintiff to the sheriff's officers was repaid by defendants to plaintiff. The jury found a verdict for plaintiff. Counsel for defendants, pursuant to leave, moved to enter a nonsuit instead of the verdict, and also moved in arrest of judgment, and obtained a rule to show cause.

**TINDAL, C. J.** This is a special action on the case, in which the plaintiff declares that he was the master and owner of a vessel which, in September, 1836, he mortgaged to the defendants for the sum of £80, with a covenant for repayment in September, 1837, and under a stipulation that, in the meantime, the plaintiff should retain command of the vessel, and prosecute voyages therein for his own profit; that the defendants, in order to compel the plaintiff, through

duress, to give up the register of the vessel, without which he could not go to sea, before the money lent on mortgage became due, threatened to arrest him for the same unless he immediately paid the amount; that, upon the plaintiff refusing to pay it, the defendants, knowing he could not provide bail, arrested him under a *capias*, indorsed to levy £95. 17s. 6d., and kept him imprisoned until, by duress, he was compelled to give up the register, which the defendants then unlawfully detained, by means whereof the plaintiff lost four voyages from London to Caen. There is also a count in *trover* for the register. The defendants pleaded the general issue; and, after a verdict for the plaintiff, the case comes before us on a double ground,—under an application for a nonsuit, and in arrest of judgment.

The first ground urged for a nonsuit is that the facts proved with respect to the writ of *capias* do not amount to an arrest. It appears to me that the arrest was sufficiently established. The facts are that the sheriff's officer comes with a *capias* to the plaintiff, when he is ill in bed, and tells him that, unless he delivers the register or finds bail, he must either take him or leave a man with him. Without actual contact, the officer's insisting that the plaintiff should produce the register, or find bail, shows that the plaintiff was in a situation in which bail was to be procured. That was a sufficient restraint upon the plaintiff's person to amount to an arrest. The authority in Buller's *Nisi Prius*, p. 62, goes the full length: "If the bailiff, who has a process against one, says to him, when he is on horseback or in a coach, 'You are my prisoner; I have a writ against you,' upon which he submits, turns back, or goes with him, though the bailiff never touched him, yet it is an arrest, because he submitted to the process." But the matter does not rest there; for, upon the suit being arranged, a caption fee, which had been charged by the officer to the plaintiff, was repaid to him by the defendants, who thereby admit the propriety of the charge.

The second ground urged for a nonsuit is that there was no proof of the suit commenced by the defendants having been terminated. But the answer to this, and to the objection urged in arrest of judgment, namely, the omission to allege want of reasonable and probable cause for the defendants' proceeding, is the same: that this is an action for abusing the process of the law by applying it to extort property from the plaintiff, and not an action for a malicious arrest or malicious prosecution, in order to support which action the termination of the previous proceeding must be proved, and the absence of reasonable and probable cause be alleged as well as proved. In the case of a malicious arrest, the sheriff, at least, is instructed to pursue the exigency of the writ. Here the directions given, to compel the plaintiff to yield up the register, were no part of the duty enjoined by the writ. If the course pursued by the de-

fendants is such that there is no precedent of a similar transaction, the plaintiff's remedy is by an action on the case, applicable to such new and special circumstances, and, his complaint being that the process of the law has been abused to effect an object not within the scope of the process, it is immaterial whether the suit which that process commenced has been determined or not, or whether or not it was founded on reasonable and probable cause.

As to the count in trover, if the taking of the register was wrongful, that taking was of itself a conversion, and no demand and refusal were necessary as a preliminary to this action. It seems to me that taking the property of another without his consent, by an abuse of the process of the law, must be deemed a wrongful taking, and therefore this rule must be discharged.

PARK, VAUGHAN, and BOSANQUET, JJ., concurred.

(See also *Wood v. Graves*, 144 Mass. 365, 11 N. E. 567, 59 Am. Rep. 95; *Page v. Cushing*, 38 Me. 523; *Bebinger v. Sweet*, 1 Abb. N. C. 263; *Foy v. Barry*, 87 App. Div. 291, 84 N. Y. Supp. 335; *Kline v. Hibbard*, 80 Hun. 50, 29 N. Y. Supp. 807. affirmed 155 N. Y. 679, 49 N. E. 1099; *Norcross v. Otis Bros.*, 152 Pa. 481, 25 Atl. 575, 34 Am. St. Rep. 669.)

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(181 Mass. 339, 63 N. E. 885.)

#### WHITE v. APSLEY RUBBER CO.

(Supreme Judicial Court of Massachusetts. Middlesex. May 20, 1902.)

##### 1. ABUSE OF PROCESS—TERMINATION OF PROSECUTION.

That a criminal prosecution has not been terminated is no defense to an action for an abuse of process in such prosecution.

##### 2. SAME.

Where one is arrested under a criminal warrant upon a charge of malicious injury to personalty, and then the complainant makes use of the arrest to compel the person arrested to abandon a claim to the right to occupy a certain house and to withdraw from its occupation, this is an abuse of process for which an action will lie, though the prosecution in which the warrant was obtained has not been terminated.

Exceptions from Superior Court; Caleb Blodgett, Judge.

BARKER, J. It is conceded that criminal proceedings were begun against the plaintiff by a sworn complaint, made to a trial justice, charging that the plaintiff had willfully and maliciously injured the personal property of the defendant, and that a warrant for the plaintiff's arrest was issued upon the complaint, and placed in the hands of a police officer, who then went to the house where the plaintiff was. The evidence tended to show that the plaintiff was

arrested upon this warrant at the house, and kept under arrest for some minutes, during which he went with the officer to the defendant's office, and then returned with him to the house, and that he was not released from the arrest until he had abandoned a claim to the right to occupy the house, and had left it, finally taking away with himself his wife and such goods of his own as were in the house when he was arrested. The evidence also tended to show that defendant caused the making of the complaint and the arrest, and made use of the arrest to compel the plaintiff, against his will, to abandon a claim to the right to occupy the house, and to compel him actually to withdraw from its occupation. The warrant has never been returned, and since it was issued there has been no judicial action upon the complaint. The fact that the prosecution has not been terminated bars any recovery upon the counts for malicious prosecution. *Cardinal v. Smith*, 109 Mass. 158, 12 Am. Rep. 682; *Wood v. Graves*, 144 Mass. 365, 366, 11 N. E. 567, 59 Am. Rep. 95. But that fact is not a defense to the counts for abuse of process. *Wood v. Graves*, *ubi supra*. A misuse of the warrant and the arrest to compel him to quit the house and relinquish his claim to the right to its occupancy would give him a right of action.

Exceptions sustained.

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## CONSPIRACY.

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(52 N. J. Law, 284, 20 Atl. 485, 10 L. R. A. 184.)

VAN HORN et al. v. VAN HORN et al. (in part).

(Supreme Court of New Jersey. October 15, 1890.)

### 1. CONSPIRACY—CIVIL ACTION FOR.

An action will lie for a combination or conspiracy to drive a trader out of business, which is carried into effect by fraudulent and malicious acts which accomplish that result.

### 2. SAME.

The gravamen in actions for conspiracy is not the conspiracy itself, but the wrongful acts and injury which are independent thereof. If the plaintiff proves the conspiracy, he may recover against all the co-tort-feasors; if he fails to prove it, he may still recover against such as are shown to be guilty of the tort without such agreement.

Case certified from circuit court, Essex county; before Justice Depue. The defendants, Amos H. Van Horn and Casper Soer, Jr., were summoned to answer James Van Horn, and Emma D. Van Horn,

his wife, in tort, for a conspiracy or combination to break up the wife's separate business of selling fancy goods on consignment at Newark. Two firms of wholesale jobbers in fancy and millinery goods had agreed verbally to supply her on credit with a stock of such goods, to be sold by her on commission, limiting the total amount to \$2,500. One of said firms had, in pursuance of the agreement with her, sent \$500 worth of goods, which were received and placed in her store for sale, and she was daily expecting the balance. With this prefatory statement, the declaration charges that the defendants, maliciously intending to injure and drive the said Emma D. Van Horn out of business, and into public scandal, shame, and disgrace, and to injure her in her credit and business, and to prevent her from acquiring any profit or gain therefrom, or from continuing the same, did maliciously conspire, combine, and agree to prevent her from enjoying and continuing her business, and in pursuance of said conspiracy, etc., did entice into their store in Newark one of the plaintiff's employees, and by artful persuasion and threats induced her to tell where the plaintiff's stock of goods was purchased, telling her the stock would be taken from her, and the business closed up; and, in pursuance and in further performance of their unlawful intent and combination, endeavored to prevent the customers and friends of the plaintiff from dealing with her, by falsely and fraudulently representing to them that she would not be able to carry on her business, but would have to close up, as she was selling goods that did not belong to her, and living off the proceeds, instead of accounting therefor, and by sending threatening notes and messages to them, designed to intimidate them from having any dealings with her, and did threaten to pursue her until she was ruined. That in further pursuance of such combination, and by means of fraud and deceit, they did persuade the said firm in New York to decline to complete their contract and did prevail on them, by means of corrupt, fraudulent, and deceitful representations and statements as to the personal and business character and standing of the plaintiff, to remove the stock already supplied her, and refuse to deliver her other goods as agreed for, leaving her entirely without any stock to sell, or customers to purchase from her, by means whereof she was left without stock and credit with the said firms, and could not obtain goods from other parties, and was driven out of her business and occupation, and deprived of the profit and livelihood which she was making and daily increasing. To this declaration a general demurrer was filed, and joinder added.

Argued at February term, 1890, before BEASLEY, C. J., and DEPUE and SCUDDER, JJ.

SCUDDER, J. The merely formal parts of this declaration will not be considered on the general demurrer, but the whole will be

examined to determine whether it sets forth in substance a legal cause of action. The distinction is now well established that in civil actions the conspiracy is not the gravamen of the charge, but may be both pleaded and proved as aggravating the wrong of which the plaintiff complains, and enabling him to recover against all as joint tort-feasors. If he fails in the proof of a conspiracy or concerted design, he may still recover damages against such as are shown to be guilty of the tort without such agreement. Pollock on Torts, 267; *Garing v. Fraser*, 76 Me. 37; *Hutchins v. Hutchins*, 7 Hill, 104; *Jones v. Baker*, 7 Cow. 445; *Parker v. Huntington*, 2 Gray, 124. The declaration begins in this form, and is unexceptionable in this particular. It is an action on the case setting forth a malicious conspiracy or confederation, with the means employed to effect its purpose, and the resulting damages to the plaintiff. No further specification is required than the general terms in which it is pleaded in the declaration.

We have not presented for determination in this pleading the vexed question whether an action will lie against a third person for the malicious procurement of the breach of a contract, if by such procurement damage was intended to result and did result to the plaintiff. *Lumley v. Gye*, 2 El. & Bl. 216; *Bowen v. Hall*, 6 Q. B. Div. 333. Here the whole pleading is based on the malicious conduct of the defendants in destroying the plaintiff's credit and patronage, and breaking up her business and means of livelihood. The case is, however, further distinguished from the cases cited above, and separated from the questions of difficulty involved in some of them, because here no breach of contract is alleged. There was no binding contract between the New York firms and the plaintiff upon which they could be sued for a breach. Where there is a suable contract between a contractor and contractee, there is difficulty, in principle, in showing privity in another, or to make the person who procures a breach of the contract the proximate cause of injury. The party who breaks the contract, for whatever cause, whether by procurement of others or of his own volition, is primarily responsible to the other party; and the procurer, it would seem, can only be held responsible for the breach where there is malice shown to the sufferer, giving a distinct cause of action for the malice which caused the breach of the contract resulting in damages to him. The plaintiff *Emma D. Van Horn*, it is alleged, was selling goods on consignment from others, with the expectation of greater consignments in the future. If the consignors refuse to send the goods to her, it does not appear that she could have any remedy against them. They could send or recall them at pleasure. The complaint here is that the goods in the plaintiff's possession were recalled, and her advantageous arrangement for credit with the consignors ended, by the fraudulent and malicious act of the defendants. If she have no

remedy against the defendants, she can have none against others for the wrong which she claims she has suffered. The difference between this action and slander is well stated in *Riding v. Smith*, 1 Exch. Div. 91, where a slander against the wife was charged as having injured the husband's business. Her name was stricken from the record as a joint plaintiff, and the action was allowed to proceed by the husband, as a trader carrying on business, founded on an act done by the defendant which led to the loss of trade and custom by the plaintiff. It was maintainable on the ground that the injury to the plaintiff's business was the natural consequence of the words spoken, which would prevent persons resorting to the plaintiff's shop. Upon the whole case presented in the declaration, *Mogul Steam-Ship Co. v. McGregor*, 21 Q. B. Div. 544, 23 Q. B. Div. 598, is important to aid in preserving the distinction between injuries caused by mere rivalries in business, without the intention of ruining the trade of the plaintiff, and those where such intent is shown with personal malice towards him. In the first report, Lord Chief Justice Coleridge says: "It is too late to dispute, if I desired to do so, as I do not, that a wrongful and malicious combination to ruin a man in his trade may be ground for such an action as this." In the later report Lord Justice Fry, after a full statement of cases, says that no mere competition carried on for the purpose of gain, and without actual malice, is actionable, even though intended to drive the rival in trade away from his place of business, and though that intention be actually carried into effect. Lord Esher, M. R., dissented. It was decided that the exclusion of the plaintiffs, rival freighters, from participation in a 5 per cent. rebate on freight on teas from China, not being through malice, but in competition to increase their own business, was not actionable.<sup>1</sup> The basis of action seems here to be, as stated in the declaration, the fraudulent and malicious acts of the defendants in driving the plaintiff Emma D. Van Horn out of her business. The statements of the means used to effect this purpose all combine to produce a single cause of action, and are not objectionable for duplicity.

The demurrer should be overruled.

(This decision was affirmed in *Van Horn v. Van Horn*, 56 N. J. Law, 318, 28 Atl. 669. See also *Wildee v. McKee*, 111 Pa. 335, 2 Atl. 108, 56 Am. Rep. 271; *Findlay v. McAllister*, 113 U. S. 104, 5 Sup. Ct. 401, 28 L. Ed. 930; *Rundell v. Kalbfus*, 125 Pa. 123, 17 Atl. 238; *Brackett v. Griswold*, 112 N. Y. 454, 20 N. E. 376; *Train v. Taylor*, 51 Hun, 215, 4 N. Y. Supp. 492; *Verplanck v. Van Buren*, 76 N. Y. 259; *Jackson v. Stanfield*, 137 Ind. 592, 36 N. E. 345, 37 N. E. 14, 23 L. R. A. 588; *Randall v. Hazelton*, 12 Allen, 412, 414; *Huot v. Wise*, 27 Minn. 68, 6 N. W. 425. Conspiring to commit a tort is not actionable, unless a wrong is done and damages ensue. *Kelt v. Wyman*, 67 Hun, 337, 22 N. Y. Supp. 133.)

<sup>1</sup> This decision was affirmed by the House of Lords. *Mogul Steamship Co. v. McGregor* [1892] A. C. 25.

([1901] App. Cas. 495.)

QUINN v. LEATHEM (in part).

(Aug. 5, 1901.)

**CONSPIRACY—INDUCING A PERSON TO BREAK HIS CONTRACT OR NOT TO DEAL WITH ANOTHER OR CONTINUE IN HIS EMPLOYMENT.**

A combination of two or more, without justification or excuse, to injure a man in his trade by inducing his customers or servants to break their contracts with him, or not to deal with him or continue in his employment, is, if it results in damage to him, actionable.

Action by Henry Leatham against Joseph Quinn and others, officers and members of a butchers' association, to recover for interference with plaintiff's business of a butcher. The members of the association adopted a rule that they would not work with non-union men, nor would they cut meat that came from a place where non-union hands were employed. Neither plaintiff nor his assistants were members of the association. Defendants demanded that plaintiff discharge his men, and employ union men in their stead. This having been refused, defendants induced a customer of plaintiff, named Munce, to cease dealing with plaintiff, on the threat that unless he did so defendants would instruct such customer's employees to cease work immediately, on the arrival of plaintiff's beef. This threat was afterwards carried into effect by the defendants, and plaintiff was thus deprived of this valuable customer, Munce, who had taken meat from him for 20 years. Defendants also induced plaintiff's assistants to leave his employ. Defendants further caused to be published "black lists" containing the names of plaintiff, and those dealing with him, holding them up to odium, and thus caused customers of plaintiff to cease dealing with him. The jury found for plaintiff. From a judgment of the Irish Court of Appeals, affirming a decision denying a motion to set aside the verdict and judgment, or in the alternative for a new trial, defendant Quinn appealed. Appeal dismissed.

EARL OF HALSBURY, L. C. My Lords, in this case the plaintiff has by a properly framed statement of claim complained of the defendants, and proved to the satisfaction of a jury that the defendants have wrongfully and maliciously induced customers and servants to cease to deal with the plaintiff, that the defendants did this in pursuance of a conspiracy framed among them, that in pursuance of the same conspiracy they induced servants of the plaintiff not to continue in the plaintiff's employment, and that all this was done with malice, in order to injure the plaintiff, and that it did injure the plaintiff. If upon these facts so found the plaintiff could have no remedy against those who had thus injured him, it could hardly be said that our jurisprudence was that of a civilized community, nor, indeed, do I understand that any one has doubted that

before the decision in *Allen v. Flood* [1898] A. C. 1, in this house, such facts would have established a cause of action against the defendants.

Now, the hypothesis of fact upon which *Allen v. Flood* was decided by a majority in this house was that the defendant there neither uttered nor carried into effect any threat at all; he simply warned the plaintiff's employers of what the men themselves, without his persuasion or influence, had determined to do, and it was certainly proved that no resolution of the trade union had been arrived at at all, and that the trade union official had no authority himself to call out the men, which in that case was argued to be the threat which coerced the employers to discharge the plaintiff. It was further an element in the decision that there was no case of conspiracy, or even combination. What was alleged to be done was only the independent and single action of the defendant, actuated in what he did by the desire to express his own views in favor of his fellow members.

Now, in this case it cannot be denied that, if the verdict stands, there was conspiracy, threats, and threats carried into execution, so that loss of business and interference with the plaintiff's legal rights are abundantly proved.

This case is distinguished in its facts from those which were the essentially important facts in *Allen v. Flood*. Rightly or wrongly, the theory upon which judgment was pronounced in that case is one whereby the present is shewn to be one which the majority of your Lordships would have held to be a case of actionable injury inflicted without any excuse whatever.

My Lords, for these reasons I am of opinion that there is no difficulty whatever in this case, and I move that this appeal be dismissed, with costs.

LORD MACNAGHTEN. My Lords, notwithstanding the strong language of the late O'Brien, J., and the arguments of the Lord Chief Baron, I cannot help thinking that the case of *Allen v. Flood* [1898] A. C. 1, has very little to do with the question now under consideration. The head-note to *Allen v. Flood* might well have run in words used by Parke, B., in giving the judgment of an exceptionally strong court, nearly half a century ago (*Stevenson v. Newnham* [1853] 13 C. B. 297) — "an act which does not amount to a legal injury cannot be actionable because it is done with a bad intent." That, in my opinion, is the sum and substance of *Allen v. Flood*, if you eliminate all matters of merely passing interest.

The case really brought under review on this appeal is *Temperton v. Russell* [1893] 1 Q. B. 715. I cannot distinguish that case from the present. So far from being impugned in *Allen v. Flood*, it had, I think, the approval of Lord Watson, whose opinion seems

to me to represent the views of the majority better far than any other single judgment delivered in the case. Lord Watson says, [1898] A. C. 108, that he did not think it necessary to notice at length *Temperton v. Russell* [1893] 1 Q. B. 715, because it was to his mind "very doubtful whether in that case there was any question before the court with regard to the effect of the animus of the actor in making that unlawful which would otherwise have been lawful." Then he goes on to say: "The only findings of the jury which the court had to consider were (1.) that the defendants had maliciously induced certain persons to break their contracts with the plaintiffs, and (2.) that the defendants had maliciously conspired to induce, and had thereby induced, certain persons not to make contracts with the plaintiffs. There having been undisputed breaches of contract by the persons found to have been induced, the first of these findings raised the same question which had been disposed of in *Lumley v. Gye*, 2 E. & B. 216. According to the second finding the persons induced merely refused to make contracts, which was not a legal wrong on their part, but the defendants who induced were found to have accomplished their object to the injury of the plaintiffs by means of unlawful conspiracy—a clear ground of liability, according to *Lumley v. Gye*, 2 E. & B. 216, if, as the court held, there was evidence to prove it."

Obviously, Lord Watson was convinced in his own mind that a conspiracy to injure might give rise to civil liability, even though the end were brought about by conduct and acts which by themselves, and apart from the element of combination or concerted action, could not be regarded as a legal wrong.

Precisely the same questions arise in this case as arose in *Temperton v. Russell* [1893] 1 Q. B. 715. The answers, I think, must depend on precisely the same considerations. Was *Lumley v. Gye*, 2 E. & B. 216, rightly decided? Speaking for myself, I have no hesitation in saying that I think the decision was right, not on the ground of malicious intention—that was not, I think, the gist of the action—but on the ground that a violation of legal right committed knowingly is a cause of action, and that it is a violation of legal right to interfere with contractual relations recognised by law if there be no sufficient justification for the interference.

The only other question is this: Does a conspiracy to injure, resulting in damage, give rise to civil liability? It seems to me that there is authority for that proposition, and that it is founded in good sense. *Gregory v. Duke of Brunswick*, 6 M. & G. 205, 953, is one authority, and there are others. There are valuable observations on the subject in *Erle, J.'s*, charge to the jury in *Duffield's Case* (1851) 5 Cox C. C. 404, and *Rowland's Case* (1851) 5 Cox C. C. 436. Those were cases of trade union outrages; but the observations to which I refer are not confined to cases depending on exploded doctrines

in regard to restraint of trade. There are also weighty observations to be found in the charge delivered by Lord FitzGerald, then FitzGerald, J., in *Reg. v. Parnell and others* (1881) 14 Cox C. C. 508. That a conspiracy to injure—an oppressive combination—differs widely from an invasion of civil rights by a single individual cannot be doubted. I agree in substance with the remarks of Bowen, L. J., and Lords Bramwell and Hannen, in the *Mogul Case*, 23 Q. B. D. 598, [1892] A. C. 25. A man may resist without much difficulty the wrongful act of an individual. He would probably have at least the moral support of his friends and neighbors; but it is a very different thing (as Lord FitzGerald observes) when one man has to defend himself against many combined to do him wrong.

I do not think that the acts done by the defendants were done “in contemplation or furtherance of a trade dispute between employers and workmen.” So far as I can see, there was no trade dispute at all. Leathem had no difference with his men. They had no quarrel with him. For his part he was quite willing that all his men should join the union. He offered to pay their fines and entrance moneys. What he objected to was a cruel punishment proposed to be inflicted on some of his men for not having joined the union sooner. There was certainly no trade dispute in the case of Munce. But the defendants conspired to do harm to Munce in order to compel him to do harm to Leathem, and so enable them to wreak their vengeance on Leathem’s servants who were not members of the union.

Lord SHAND, Lord BRAMPTON, and Lord LINDLEY wrote concurring opinions.

### Appeal dismissed, with costs.

(See *Read v. Friendly Society, etc.* [1902] 2 K. B. 732; *Glamorgan Coal Co. v. So. Wales Miners’ Federation* [1903] 2 K. B. 545. It is generally held in this country that a “boycott” by a combination of men is an actionable conspiracy. *Gray v. Building Trades Council* [Minn.] 97 N. W. 663 [citing many cases]; *Barr v. Essex Trades Council*, 53 N. J. Eq. 101, 30 Atl. 881; *Webb v. Drake*, 52 La. Ann. 290, 26 South. 791; *Hopkins v. Oxley Stave Co.*, 83 Fed. 912, 28 C. C. A. 99. The same has been held of a combination of men, having no legitimate interests to protect, to ruin the business of another by maliciously inducing his patrons and third parties not to deal with him [*Ertz v. Produce Exchange Co.*, 79 Minn. 140, 81 N. W. 737, 48 L. R. A. 90, 79 Am. St. Rep. 433; *Delz v. Winfree*, 80 Tex. 400, 16 S. W. 111, 26 Am. St. Rep. 755; *Jersey City Printing Co. v. Cassidy*, 63 N. J. Eq. 759, 53 Atl. 230; on this subject see note ante, on page 116, and cases cited]; so of a combination of working men to coerce others by threats or intimidation to join their union, or to deprive them of work, etc. [*Erdman v. Mitchell*, 207 Pa. 79, 56 Atl. 327; *Curran v. Galen*, 152 N. Y. 33, 46 N. E. 297, 37 L. R. A. 802, 57 Am. St. Rep. 496; *Plant v. Woods*, 176 Mass. 492, 57 N. E. 1011, 51 L. R. A. 339, 9 Am. St. Rep. 330; cf. *National Protective Ass’n v. Cumming*, 170 N. Y. 315, and cases cited on page 348, 63 N. E. 369, 379, 58 L. R. A. 135, 88 Am. St. Rep. 648].)

## SLANDER AND LIBEL.

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### I. SLANDER.

#### A. SLANDER PER SE.

##### 1. Charge of crime.

(3 Hill, 21.)

YOUNG v. MILLER.

(Supreme Court of New York. May Term, 1842.)

##### 1. SLANDER—WORDS IMPUTING CRIME—THE GENERAL AMERICAN RULE.

Words imputing a charge which, if true, would subject the party charged to an indictment for a crime involving moral turpitude, or subject him to an infamous punishment, are in themselves actionable.

##### 2. SAME—CHARGE OF REMOVING LANDMARK.

The removal of a landmark being made by statute (2 Rev. St. N. Y. pp. 695, 697, §§ 32, 40) indictable as a misdemeanor and punishable by fine and imprisonment in the county jail, and also involving moral turpitude, words charging a person with that offense are actionable per se.

Demurrer to declaration.

Action for slander. The defamatory words alleged in the declaration to have been spoken by defendant of and concerning plaintiff were as follows: "You [the said plaintiff meaning] have removed my landmark, [meaning the monument to designate the corner or boundary of defendant's land.]" "You [the said plaintiff meaning] have removed my landmark, [meaning the monument of said defendant's land,] and I [the said defendant meaning] can prove it." Also the latter words, with the addition, "by George Wilkins." Also the same words, with the addition, "and cursed is he that removeth his neighbor's landmark." Also, "Cursed is he that removeth his neighbor's landmark, and you [the said plaintiff meaning] have done it;" meaning that plaintiff had removed the monument of defendant's land, and thereby then and there meaning to charge plaintiff with the offense of willfully and maliciously removing the monument designating the corner or other point in the boundary of defendant's land. Defendant demurred to the declaration on the ground that the words were not actionable in themselves, and that there was no allegation of special damage. Plaintiff joined in demurrer.

BRONSON, J. There has been much discussion in the books upon the question, what words are actionable in themselves, when

not spoken of the plaintiff in his office, profession, or calling? But it will be unnecessary to examine the cases at large, for the reason that a rule has been laid down and acted upon in this state, which, although not entirely satisfactory to my mind, I feel bound to follow. In *Brooker v. Coffin*, 5 Johns. 188, 4 Am. Dec. 337, the court, "upon the fullest consideration," laid down the following rule: "In case the charge, if true, will subject the party charged to an indictment for a crime involving moral turpitude, or subject him to an infamous punishment, then the words will be in themselves actionable." In *Widrig v. Oyer*, 13 Johns. 124, the counsel proposed to modify the rule by changing "or" into "and," but the court did not yield to the suggestion. The rule was repeated and followed in *Martin v. Stillwell*, 13 Johns. 275, 7 Am. Dec. 374, where words were held actionable which charged the plaintiff with keeping a bawdy-house. Such a house is a common nuisance, and the person keeping it may be punished by indictment. In *Gibbs v. Dewey*, 5 Cow. 503, the charge was that the plaintiff had handed papers to a juror to influence or bribe the jury, and the words were held actionable. In *Alexander v. Alexander*, 9 Wend. 141, the charge was that the plaintiff had forged the defendant's name to a petition to the legislature; and, although the imputed offense was only a misdemeanor, and not a felonious forgery, the words were held actionable. In all of these cases the court went upon the ground that the words imputed "a crime involving moral turpitude," and for which the offender might be proceeded against by indictment.

Removing a landmark seems not to have been an offense at the common law, nor was it made so by statute until 1830, when it was enacted that "every person who shall willfully or maliciously remove any monuments of stone, wood, or other durable material, erected for the purpose of designating the corner or any other point in the boundary of any lot or tract of land, shall, upon conviction, be adjudged guilty of a misdemeanor." The punishment is fine and imprisonment in the county jail. 2 Rev. St. pp. 695, 697, §§ 32, 40. And, as in most other cases of crime, the prosecution is by indictment. The charge which has been made against the plaintiff, if true, will subject him to punishment by indictment; and the next inquiry is whether the imputed crime is one "involving moral turpitude."

Removing landmarks was forbidden among the Jews, and a curse was denounced upon the offender. Deut. xix. 14, and xxvii. 17; Job, xxiv. 2; Prov. xxii. 28, and xxiii. 10. The learned and venerable Doctor Scott, in his commentary upon the first-mentioned passage, says: "As landmarks constituted the customary method of distinguishing landed property in those days, removing them would be a crime among the Israelites similar to forging, altering, destroying, or canceling the title-deeds of estates at this day; and would

occasion atrocious injustice, and make way for dispute and lawsuits." And in his remarks upon Prov. xxii. 28, he calls the offenders "robbers." Mr. Henry, in his commentary upon Deut. xix. 14, says: "Though the landmarks were set by the hands of men, yet he was a thief and a robber, by the law of God, that removed them." And in his comments upon Job, xxiv. 2, he says the offense is equivalent to that of "forging or destroying deeds." Doctor Adam Clark, in his commentary upon these passages, has taken nearly the same view of the question, though he has not been quite so severe upon the offenders. But this is a subject upon which it cannot be necessary to multiply authorities. There is evidently no great difference, in a moral point of view, between altering the courses and distances in a deed, for the purpose of depriving the owner of a part of his land, and producing the same result by changing the visible bounds of his estate. The one is a forgery on paper, and the other upon the face of the earth, and when either of these wrongs is done for the purpose of acquiring the property of another, the offender may justly be regarded as a thief as well as a forger. All men must agree that the crime of removing landmarks is one involving a high degree of moral turpitude; and, as it is an indictable offense, the case falls plainly within a rule from which we are not at liberty to depart. The demurrer does not point out any defect in the form of the declaration, and I am inclined to think it sufficient. The defendant must have intended to charge the plaintiff with a criminal offense. *Miller v. Miller*, 8 Johns. 74, 77; *Niven v. Munn*, 13 Johns. 48; *Goodrich v. Woolcott*, 3 Cow. 231; *Woolcott v. Goodrich*, 5 Cow. 714; *Gibbs v. Dewey*, Id. 503.

The plaintiff is entitled to judgment.

COWEN, J. I concur in the views expressed by Mr. Justice Bronson on the question raised by the demurrer. It was contended on the argument that the cases in this court which sanction an action of slander for words imputing a misdemeanor intend those misdemeanors only to which the common or statute law now, or the common law heretofore, attached legal, as contradistinguished from moral, infamy. I understand those cases as laying down a rule of much greater compass,—one which comprehends every indictable offense, which is at the same time infamous or disgraceful in a general sense; any offense which detracts from the character of the offender as a man of good morals. I admit that this principle covers a wide field of litigation. Perhaps it extends beyond what was once understood to be the true boundary. But the objection that the law will not tolerate the uncertainty thus introduced is weakened by the manner in which the same law deals with actions like the present in kindred cases. Fluctuating as the rules of conduct prescribed by the moral code may be, they are every day judicially recognized as

the test of actions for printed slander, without the technical limit required by the rule now in question. There the offense imputed need not be even indictable or legally punishable in any way; and a writing or picture alluding to a mere foible may be the subject of an action, if intended to bring the party into contempt or ridicule.

NELSON, C. J., also concurred.

Judgment for the plaintiff.

(The same decision was made in *Todd v. Rough*, 10 Serg. & R. 18. In *Davis v. Carey*, 141 Pa. 314, 21 Atl. 633, the rule laid down in *Young v. Miller*, ante, p. 301, as to what charges of crime are actionable *per se*, is approved, but it is said that the word "infamous" is to be understood in its popular and not in its technical legal sense. "In the American cases," says this decision, "importance is attached to the inherent nature of the indictable act, and also to the punishment which the law assigns to it, upon the principle that social degradation may result from either." "There is a variety of misdemeanors" [as nuisance, assault and battery, and the like] "to the commission of which not even the shadow of disgrace is attached by the world," and hence a false charge of committing these is not slanderous *per se*. *Id.*; *Andres v. Koppenheaver*, 3 Serg. & R. 255, 8 Am. Dec. 647; see *Geary v. Bennett*, 53 Wis. 444, 10 N. W. 602; *Rutherford v. Paddock*, 180 Mass. 289, 293, 62 N. E. 381, 91 Am. St. Rep. 282. A charge of committing an act involving moral turpitude is not actionable *per se*, if the act is not an indictable offense. *Pollard v. Lyon*, 91 U. S. 225, 23 L. Ed. 308; *Anonymous*, 60 N. Y. 262, 19 Am. Rep. 174. Language which charges a man with intending at some future time to commit an offense is not actionable. *Fanning v. Chace*, 17 R. I. 388, 22 Atl. 275, 13 L. R. A. 134, 33 Am. St. Rep. 878.)

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(11 Q. B. Div. 609.)

WEBB v. BEAVAN.

(Queen's Bench Division. May 30, 1883.)

**SLANDER—WORDS IMPUTING CRIME—THE ENGLISH RULE.**

Words imputing a criminal offense punishable corporally are actionable *per se*, even though such offense be not punishable by indictment.

Demurrer to statement of claim.

Action for slander. The statement of claim alleged that defendant maliciously and falsely spoke and published of plaintiff the words following: "I will lock you [meaning the plaintiff] up in Gloucester gaol next week. I know enough to put you [meaning the plaintiff] there, [meaning thereby that the plaintiff had been and was guilty of having committed some criminal offense or offenses.]" Plaintiff claimed £500 damages. Defendant demurred, on the ground that the statement of claim did not allege circumstances showing that the defendant had spoken or published of the plaintiff any actionable

language, and that no cause of action was disclosed. Plaintiff joined in demurrer.

W. H. Nash, in support of the demurrer.

To make the words actionable, the innuendo should have alleged that they imputed an offense for which plaintiff could have been indicted. It was not sufficient to allege that they imputed a criminal offense merely. Odger, *Sland. & Lib.* p. 54.

Hammond Chambers, opposed.

According to the earlier authorities, the test, in ascertaining whether words were actionable per se, was whether the offense was punishable corporally or by fine. It was not necessary to allege that the words imputed an indictable offense. *Com. Dig. tit. "Action on the Case for Defamation," D 5, 9; Curtis v. Curtis, 10 Bing. 477.*

POLLOCK, B. I am of opinion that the demurrer should be overruled. The expression "indictable offense" seems to have crept into the text-books, but I think the passages in *Comyns' Digest* are conclusive to show that words which impute any criminal offense are actionable per se. The distinction seems a natural one, that words imputing that the plaintiff has rendered himself liable to the mere infliction of a fine are not slanderous, but that it is slanderous to say that he has done something for which he can be made to suffer corporally.

LOPES, J. I am of the same opinion. I think it is enough to allege that the words complained of impute a criminal offense. A great number of offenses which were dealt with by indictment 20 years ago are now disposed of summarily, but the effect cannot be to alter the law with respect to actions for slander.

Demurrer overruled.

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(3 Hill, 139.)

#### CHASE v. WHITLOCK.

(Supreme Court of New York. July Term, 1842.)

#### SLANDER—WORDS IMPUTING CHARGE OF SWINDLING.

To say that a person is a "swindler" is not actionable per se; the word being merely equivalent to "cheat," and not necessarily implying the crime of obtaining goods under false pretenses.

Demurrer to declaration.

Action for slander. The declaration alleged, in its first count, the speaking by defendant of the words, "Chase is a blackleg and swin-

dlar; here is Stephen Potter's letter to confirm it;" with the innuendo that plaintiff had been guilty of the crime of swindling; and in the second count the words, "Chase is a black-legged swindler; his agent refused to do his business; here is Potter's letter, which I will show you, confirming the fact;" with the innuendo that plaintiff had been guilty of the crime of swindling; and defendant was so understood by the people who heard the words. Defendant demurred to the declaration. Plaintiff joined in demurrer.

BRONSON, J. There is no colloquium of obtaining goods by false pretenses, nor is there anything else to show that the words were used in any other than their ordinary sense. Swindling is not a crime known to our law. The word "swindler" is an exotic, which came from Germany, and has but recently become naturalized in our language. In Todd's Johnson, "swindler" is defined to be "a sharper; a cheat;" and to swindle, "to cheat; to impose upon the credulity of mankind, and thereby to defraud the unwary by false pretenses and fictitious assumptions." Webster defines "swindler" as "a cheat: a rogue; one who defrauds grossly, or one who makes a practice of defrauding others by imposition or deliberate artifice." And in Tomlin's Law Dictionary (Ed. 1836) the word is defined, "a cheat; one who lives by cheating." To call one a "swindler" is about equivalent to saying he is a "cheat," which has never been held actionable. Either of those charges may, under certain circumstances, imply that the accused is guilty of the crime of obtaining goods by false pretenses. But they do not necessarily mean so much. There are many ways in which a man may wrong another in such a manner as to earn the title of "swindler" or "cheat," without subjecting himself to an indictment for a criminal offense. This question has been considered as settled ever since the decision in *Savile v. Jardine*, 2 H. Bl. 532. It was there held that words charging the plaintiff with being a swindler were not actionable. Eyre, C. J., said the word was "only equivalent to 'cheat;' it cannot be carried further; and that is not actionable." He added, "'thief' always implies felony, but 'cheat' not always." Buller, J., said "swindler" means no more than "cheat;" "when a man is said to be 'swindled,' it means 'tricked' or 'outwitted.'" That case was followed by the supreme court of Massachusetts in *Stevenson v. Hayden*, 2 Mass. 406; and see *Carter v. Andrews*, 16 Pick. 1, 9. In *Neal v. Lewis*, 2 Bay, 204, the word "swindler" was applied to a merchant; and, besides, the plaintiff was also charged with being a thief. The court had no occasion to say whether the first charge was actionable or not. I am not aware that words charging the plaintiff with being a swindler have ever been held actionable, and, upon principle, I think they are not. They

do not necessarily import a criminal offense involving moral turpitude, and punishable by indictment.

Judgment for defendant.

(So held also in *Pollock v. Hastings*, 88 Ind. 248; *Well v. Altenhofen*, 26 Wis. 708. But to call a man "swindler and thief" is actionable *per se* [*Stern v. Katz*, 38 Wis. 136]; so to call a man a "thief" [*Krup v. Corley*, 95 Mo. App. 640, 69 S. W. 609; *Smith v. Moore*, 74 Vt. 81, 52 Atl. 320].)

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(14 Johns. 233.)

VAN ANKIN v. WESTFALL (In part).

(Supreme Court of New York. August Term, 1817.)

**SLANDER—WORDS IMPUTING CRIME IN ANOTHER STATE.**

An action may be maintained for words charging a crime, although the transaction referred to took place in a State other than that in which the words were spoken and the action brought, so that there could be no prosecution for the crime in the latter State, even if it had been committed.

Motion for new trial.

Action for slander, in speaking of plaintiff the words, as alleged in the declaration and proved on the trial, "He is a thief, and has stolen fifty dollars in cash from Jacob De Witt." These words were spoken in the state of New York, but referred to a transaction which took place in the state of Pennsylvania, where Jacob De Witt resided. Defendant moved for a nonsuit, on the ground that the words as proved were not actionable, as they did not charge plaintiff with the commission of any crime or misdemeanor for which he was liable to be indicted and punished in the state of New York. The motion was denied. The case was submitted to the court without argument.

PER CURIAM. This is an action of slander, charging the defendant with saying of the plaintiff, "He is a thief, and has stolen fifty dollars in cash from Jacob De Witt." It appeared in proof that Jacob De Witt resided in the state of Pennsylvania, and that the transaction referred to by the defendant took place in that state. The plaintiff's right to sustain the action was objected to, because no crime was alleged against him for which he could be punished here. This objection was properly overruled. Although the plaintiff might not be amenable to our law, had the charge against him been true, yet, from anything that appears, he might have been demanded as a fugitive from justice, and have been punished, if guilty, in the state of Pennsylvania. But the right of the plaintiff to sustain the action does not depend upon the question whether he was liable to be prosecuted and punished for the crime charged against him; as, when the statute of limitations has run against the criminal prosecu-

tion, it is still slander to charge the party with the offense; and the party making the charge would have a right to justify, and show the truth of his allegation, notwithstanding the criminal prosecution might be barred. The motion for a new trial must accordingly be denied.

Motion denied.

(So held also in *Klumph v. Dunn*, 66 Pa. 141, 5 Am. Rep. 355.)

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(2 Moody & R. 119.)

**FOWLER v. DOWDNEY.**

(Court of Queen's Bench. March 2, 1838.)

**SLANDER—WORDS IMPUTING CRIME FOR WHICH PUNISHMENT HAS BEEN SUFFERED.**

To say falsely that a person is a "returned convict" is actionable per se; the obloquy remaining, even though the words import that the punishment has been suffered.

At nisi prius, before DENMAN, C. J.

Action for slander for saying of plaintiff, "He is a returned convict." The declaration averred, as special damage, the loss of a customer to whom the words were spoken, plaintiff being a tradesman; but the proof of the special damage failed.

DENMAN, C. J. My opinion is that these words are actionable, because they impute to the plaintiff that he has been guilty of some offense for which parties are liable to be transported. That is, I think, the plain meaning of the words, as set out in the declaration. They import, to be sure, that the punishment has been suffered, but still the obloquy remains.

Verdict for plaintiff; damages, one shilling.

(To the same effect are *Smith v. Stewart*, 5 Pa. 372; *Krebs v. Oliver*, 12 Gray, 242.)

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(2 Wend. 534.)

**GORHAM v. IVES.**

(Supreme Court of New York. May Term, 1829.)

**SLANDER—WORDS IMPUTING CRIME BY INTERROGATION.**

An action may be maintained for speaking words imputing crime, although not in direct and positive terms, but by way of interrogation only, if, according to the natural and fair construction of the language used, in connection with the circumstances, the hearers had a right to believe that defendant intended to charge plaintiff with the commission of a criminal offense.

**Demurrer to declaration.**

Action for slander. The declaration alleged that defendant had become possessed of a promissory note dated August 27, 1825, made by William Erwin and James Erwin, payable to William McMurray or order, for \$51.84, payable four months after date, "with interest from date," (the words quoted being interlined in the note,) which had been indorsed to plaintiff, who had collected the amount. The second count of the declaration alleged that defendant, in a discourse with one Parmelee and others, after showing the note, spoke these words: "The note is in Edward A. Cook's handwriting, and the words at the end of the note, 'with interest from date,' are in a different handwriting. The note has only passed through the hands of Cook, McMurray, and Gorham, and these words must have been put there by one of them. The signers of the note say the words were put there since they signed, and I have shown the note to a number of persons,—Reid and others;" and then, addressing Parmelee, proceeded: "Do not you think it is Gorham's handwriting?" and that, Parmelee having asked defendant to explain himself and what he meant, defendant replied, "Time will show." The third count of the declaration alleged that defendant, in a certain other discourse, after showing the note to sundry persons, spoke these words, "This note has been altered after it was signed;" and, on being asked by one of the by-standers if he knew by whom it had been done, he replied, "I do not, but I have shown it to some persons, and they said that the addition at the end of the note was in Shubael Gorham's handwriting;" and added that "one of the signers would swear that the note that he signed was not written payable with interest, for he refused to sign such an one;" and, on being asked by one of the persons present "if Gorham would commit forgery," defendant, holding out the note, replied, "You can see for yourselves." Defendant demurred to the second and third counts of the declaration.

SUTHERLAND, J. I am of opinion that both counts are good. The words used by the defendant necessarily imply, when taken in connection with the colloquium, that the words "with interest from date" had been forged and added to the note after its signature; and the inquiry by the defendant in the second count of Parmelee, "if he did not think the addition was in Gorham's handwriting," and his declaration in the third count that he had showed it to some persons who said "the addition was in Shubael Gorham's handwriting," leave no reasonable doubt that it was the intention of the defendant to impress upon the minds of the persons whom he addressed the belief that the forgery had been committed by Gorham. The charge need not be couched in direct and positive terms. The imputation of crime may be as effectually made by way of interrogation as by an

affirmative allegation. The only inquiry is whether, according to the natural and fair construction of the language used by the defendant, (taken in connection with the preliminary circumstances stated by way of colloquium,) the persons in whose presence and hearing the language was used had a right to believe that it was the intention of the defendant to charge the plaintiff with the commission of a criminal offense. Such was obviously the intention of the defendant in this case.

Judgment for plaintiff on demurrer, with leave to defendant to plead on payment of costs.

(So held also in *Hotchkiss v. Oliphant*, 2 Hill, 510. So the charge may be made by ironical words [*Boydell v. Jones*, 4 M. & W. 446], or by other indirect modes of speech which are effectual to convey the defamatory meaning [*Comm. v. Kneeland*, 20 Pick. 206; *Sanderson v. Caldwell*, 45 N. Y. 398, 6 Am. Rep. 105; *Ruble v. Bunting* (Ind. App.) 68 N. E. 1041].)

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(1 Johns. Cas. 279.)

**VAN RENSSELAER v. DOLE.**

(Supreme Court of New York. April Term, 1800.)

**SLANDER—WORDS IMPUTING CRIME ON FACTS NOT CONSTITUTING THE OFFENSE.**

To say that certain persons are "highwaymen, robbers, and murderers," the words being spoken and understood with reference to transactions which were known not to amount to the charge the words import, is not actionable.

**Motion for new trial.**

Action for slander. The declaration charged defendant with speaking of plaintiff and others the following words: "John Keating is as damned a rascal as ever lived, and all who joined his party and the procession on the 4th day of July [meaning the said John Van Rensselaer and the party and procession in which said John Keating acted as captain on said 4th day of July] are a set of black-hearted highwaymen, robbers, and murderers." In other counts, the words were differently charged, with some additional expressions, but in substance the same. Defendant pleaded the general issue. At the trial the words charged were proved to have been spoken by defendant. On behalf of defendant it was shown that, on the day preceding the speaking of the words, there had been a public procession to a church in the place where the parties resided; that Keating commanded an artillery company, which formed part of the procession, attended with music; that one Bird claimed one of the instruments of music, a bass-viol, and went to the church to demand or take it, but it was refused and retained by force; that upon this an affray

ensued, in which Bird received a dangerous wound. There was evidence that the conversation in which these words were spoken was understood by the witnesses to relate to the transactions of the preceding day, and that the terms "highwaymen, robbers, and murderers" were used in reference to the treatment of Bird in withholding the bass-viol, and in wounding him. The judge was of opinion that the words being spoken in relation to the transactions of the preceding day, and so understood, were thereby explained, and on that account not actionable. The jury found a verdict for plaintiff for \$50 damages and 6 cents costs. Defendant moved for a new trial, on the ground that the verdict was contrary to law and the evidence.

PER CURIAM. We agree in opinion with the judge at the trial. The words spoken by the defendant were clearly understood to apply to the transactions of the preceding day, and these were known not to amount to the charge which the words would otherwise import.<sup>1</sup> Let the verdict, therefore, be set aside; and, there being no question upon the evidence, the finding of the jury must be consid-

<sup>1</sup> NOTE BY EDITOR OF SECOND EDITION OF JOHNSON'S CASES. In *Cristie v. Cowell, Peake*, 4, the words proved were, "He is a thief, for he has stolen my beer." It appeared in evidence that the defendant was a brewer, and that the plaintiff had lived with him as a servant; in the course of which service he had sold beer to different customers of the defendant, and received money for the same which he had not duly accounted for. Lord Kenyon directed the jury to consider whether these words were spoken in reference to the money received and unaccounted for by the plaintiff, or whether the defendant meant that the plaintiff had actually stolen beer; for, if they referred to the money not accounted for, that, being a mere breach of contract, so far explained the word "thief" as to make it not actionable. Thus, if a man says to another, "You are a thief, for you stole my tree," it is not actionable, (*Minors v. Lee-ford*, Cro. Jac. 114; Bull. N. P. p. 5;) for it shows he had a trespass, and not a felony, in his contemplation. Words may import a charge of felony, yet, if it appear from the subject-matter that the fact charged could not have happened, an action cannot be maintained. *Jackson v. Adams*, 2 Bing. N. C. 402, 2 Scott, 599; *Snag v. Gee*, 4 Coke, 16a; *Steph. N. P.* 2252, 2253. "Words apparently actionable may be explained by circumstances to have been intended and understood in an innocent sense. Thus, though the defendant should say, 'Thou art a murderer,' the words would not be actionable, if the defendant could make it appear that he was conversing with the plaintiff concerning unlawful hunting, when the plaintiff confessed that he killed several hares with certain engines, upon which the defendant said, 'Thou art a murderer;' meaning a murderer of hares so killed. Lord Cromwell's Case, 4 Coke, 13. But the words, 'I think the business ought to have the most rigid inquiry, for he murdered his first wife,—that is, he administered improperly medicines to her for a certain complaint, which was the cause of her death,'—were held to be actionable, as importing, at least, a charge of manslaughter; and, though the words were doubtful, the doubt would be cured by the finding of a jury that they were meant in that sense. *Ford v. Primrose*, 5 Dowl. & R. 288." 1 *Star-kie, Sland. & L.* (Wend. Ed.) 99 et seq.

ered as contrary to law, and it is therefore ordered that the costs abide the event of the suit.

### Rule granted.

(The rule is that the language employed is to be given its ordinary import and meaning, unless an explanation accompanies the words, which gives them a different meaning, or unless all the hearers understand that they refer to a transaction which cannot constitute the crime which the words imply. *Hayes v. Ball*, 72 N. Y. 418. "To charge one with having murdered a person who is alive to the knowledge of all cannot be understood to charge the crime of murder"; but the rule is otherwise if any one of the hearers does not know that such person is still alive. *Hamlin v. Fautl* (Wis.) 95 N. W. 955; *Egan v. Semrad*, 113 Wis. 84, 88 N. W. 906; *Kidd v. Ward*, 91 Iowa, 371, 59 N. W. 279.)

## 2. Charge of certain contagious diseases.

(7 Gray, 181.)

GOLDERMAN v. STEARNS et ux.

(Supreme Judicial Court of Massachusetts. Oct. Term, 1856.)

### 1. SLANDER—WORDS IMPUTING CONTAGIOUS DISEASE.

To say of a man that he has the venereal disease is actionable, as tending to exclude him from society; but if, when the charge was made, he had such disease, the truth of the charge is a justification.

### 2. SAME.

Defendant asserted that plaintiff had the venereal disease, and, having married, communicated it to his wife, and that he was "the guilty one." *Held*, that no action could be maintained therefor if plaintiff in fact had such disease; and that evidence that it was communicated to him by his wife, whom he had married not knowing that she had the disease, was immaterial.

### 3. SAME—IMPLIED CHARGE OF CRIME.

Such words are not actionable as imputing to plaintiff a punishable offense; they do not necessarily import the commission of adultery or fornication.

### On exceptions.

Action by Caspar Golderman against Charles Stearns and wife for slander. The declaration alleged that the female defendant accused plaintiff of "having had a loathsome venereal disease, and with that disease upon him having contracted marriage, and given the disease to his wife, by words spoken of the plaintiff, who was then and there lately married to his wife, substantially as follows: 'Golderman has the venereal disease. It is an old affair, and being married has brought it on again. He is the guilty one. He has given it to his wife.'" At the trial plaintiff introduced evidence tending to prove the words and colloquium set forth, and rested his case. Defendants then introduced evidence that, immediately after his marriage, plaintiff had such disease, and claimed that this made out a justification.

Plaintiff then offered to prove that, being a widower, and the father of adult children, he married a woman who had the disease, of which fact he was then ignorant, and, immediately after the marriage, took the disease from his wife, and thereupon sent her away from his house, and had not lived with her since. The judge ruled that if the jury were satisfied that plaintiff, at the time of the speaking of the words set forth in the declaration, had the disease in fact, it would be a sufficient justification, and the evidence offered by plaintiff was immaterial. A verdict was taken for defendants. Plaintiff alleged exceptions.

METCALF, J. The charge against the plaintiff of his having the venereal disease is held to be actionable for the same reason that a charge of his having the leprosy or the plague would be; not because the charge imputes any legal or moral offense, but solely because it tends to exclude him from society as a person having a disgusting and contagious disease. Hence it is that to charge one with having had the disease is not actionable; such charge not tending to exclude him from society as a person with whom it is unsafe to associate. March, Sland. (Ed. 1674,) 77, 78; Crittal v. Horner, Hob. 219; Bloodworth v. Gray, 8 Scott, N. R. 11; Carslake v. Mapledoram, 2 Term R. 473; 3 Bl. Comm. 123, note by Christian; 2 Dane, Abr. 568.

The jury having found that the plaintiff, when the charge against him was made, had the venereal disease, there remains no ground on which this action can be maintained; for the truth of the charge is a justification. Doubtless such a charge as the plaintiff complains of may be accompanied with words that necessarily impute adultery or fornication, either of which is an offense punishable by the laws of this commonwealth. In such a case the charge would be actionable. But, in the present case, the words which were added to the charge of the plaintiff's having the disease did not impute any punishable offense. They only asserted that the plaintiff, while a widower, was diseased, and, after his marriage to his present wife, communicated the disease to her. The allegation that he was "the guilty one" means that the disease was communicated by him to her, and not by her to him. It does not import that he contracted the disease guiltily; that is, by committing adultery or fornication. Nor does the plaintiff's declaration aver that any punishable offense is imputed to him by the words spoken.

Judgment on the verdict.

(See also *Williams v. Holdredge*, 22 Barb. 396; *Hewit v. Mason*, 24 How. Prac. 366; *Kaucher v. Blinn*, 29 Ohio St. 62, 23 Am. Rep. 727.)

### 3. Charge affecting a man in his office, profession, trade, employment, etc.

(7 Wend. 204.)

FORWARD v. ADAMS (in part).

(Supreme Court of New York. May, 1831.)

#### 1. SLANDER—WORDS AFFECTING PLAINTIFF IN HIS OFFICE OR VOCATION.

Words which are not actionable in themselves, but could be so only in consequence of the special character of the person of whom they are spoken, are not actionable when spoken after such person has ceased to sustain that special character; the ground of action is that the party is disgraced or injured in his profession or trade, or exposed to the hazard of losing his office, in consequence of the slanderous words, not that his general reputation is affected by them.

#### 2. SAME—CHARGE AFFECTING PUBLIC OFFICER AFTER TERMINATION OF HIS OFFICE.

To say, of a person formerly appointed to negotiate a treaty with Indians, that he bribed them to sign the treaty, not being actionable except as affecting him in such office, is not actionable where the office had expired before the words were spoken.

Demurrer to declaration.

Action for slander. The declaration set forth by way of inducement that, on May 23, 1826, plaintiff was appointed by the president of the United States a commissioner on the part and behalf of the United States, as the general protector of Indian tribes, to attend a treaty to be held between the proprietors of the pre-emption right to certain lands held by Indians in the state of New York, and those Indians, under the sanction of the government of the United States, for the extinguishment of the right of the Indians to the occupancy of such lands, with instructions to exercise a sound discretion in the business, and, if satisfied of the fairness of the propositions of the proprietors, to afford them such co-operation in effecting the object of the treaty as he might judge proper; and that, having accepted the appointment, plaintiff, on August 31, 1826, attended a treaty at Buffalo, and, being satisfied of the fairness of the propositions of the proprietors, he sanctioned, approved, and recommended a treaty there made between the Indians and proprietors for the extinguishment of the right of the Indians to the occupancy of the lands, the subject of the treaty; and it charged that defendant, in a discourse had on June 1, 1828, of and concerning the plaintiff, and of and concerning his conduct as such commissioner, and in relation to the treaty which had been concluded, uttered the following words, alleged to be false, scandalous, and defamatory, viz.: "He bribed some of the Indians to sign the treaty. He hired some of the Indians to sign the treaty. He was guilty of hiring or bribing some of the Indians to sign the treaty. He was dishonest with the In-

dians." Innuendo, that plaintiff had misdemeaned himself in his appointment, had perverted his office, and corruptly exercised his influence with the Indians by means of bribery and corruption. Defendant demurred to the declaration.

SUTHERLAND, J. The demurrer is well taken. It is conceded that the words do not impute an indictable offense. If true, the plaintiff would not be subjected by them to a criminal prosecution. The offense, if any, was an offense against the United States, and it is not shown that they have any statute applicable to the case; and the better opinion seems to be that the court of the United States have no general common-law criminal jurisdiction. *U. S. v. Hudson*, 7 Cranch, 32, 3 L. Ed. 259; *U. S. v. Worrall*, 2 Dall. 384, Fed. Cas. No. 16,766, 1 L. Ed. 426; opinion of Chief Justice Marshall in *Burr's Trial*; *U. S. v. Coolidge*, 1 Gall. 488, Fed. Cas. No. 14,857; *Id.*, 1 Wheat. 415, 4 L. Ed. 124; *Dissertation on the Nature and Extent of the Jurisdiction of the Courts of the United States*, by Mr. Du Ponceau; 1 Kent, Comm. 311, 320; *Serg. Const. Law*, 262, 265.

The action is put distinctly on the ground that the words were spoken of the plaintiff as a public officer, and tended to his injury and disparagement in that character. The fatal objection to the action on this ground is that it appears on the face of the declaration that the plaintiff was not in office when the words were spoken, but that the office itself, being a special trust, and temporary in its nature, had expired about two years before the uttering of the slanderous words. Where an action is brought for words (not actionable in themselves) spoken of a person in a particular calling or profession or employment, it must appear that he followed such profession or employment when the words were spoken. In *Gibs v. Price, Style*, 231, the judgment was arrested because it was not averred that the plaintiff was a barrister at the time of the bringing of his action, the words having been spoken of him in his professional character. And in *Cary's Case*, Poph. 207, the words were spoken of the plaintiff as a counselor at law; and it was said by Jones, J., that it was not sufficient for the plaintiff to aver that he was eruditus in lege, but he ought to say that he was homo conciliarius. He must show that he sustained the special character in relation to which the words were uttered. In *King v. Lake*, 2 Vent. 28, (which was also a case of words spoken of the plaintiff as a lawyer,) it was expressly stated that the plaintiff was bred up to the law, and practiced it, and had many persons for his clients, and thereby got money and maintained his family. *Kerle v. Osgood*, 1 Vent. 50. Upon the strength of these and other cases, it is laid down in treatises upon this subject that, where an action is brought for words spoken of a barrister or physician, it must appear that he practiced as such at the time the words were spoken; for otherwise the words could not have af-

affected him professionally. *Starkie, Sland. & L. 105; Bac. Abr. tit. "Slander," 212-215.* So, if an action be brought for publishing words of a tradesman, concerning his trade, it must be averred that at the time of publishing them he was in trade; for, if he were not at that time in trade, his credit could not be hurt by the words. *Collins v. Malin, Cro. Car. 382; Jordan v. Lyster, Cro. Eliz. 273; Tut-hill v. Milton, Cro. Jac. 222.* These cases all admit this principle, for, although the court in some of them refused to arrest the judgment, it was upon the ground that, after verdict, they would intend, from the general averment, (that the plaintiff had, for a long time preceding the day on which the words were laid, exercised the trade,) that he continued to exercise it on the day the words were published.

The ground of action in these cases is that the party is disgraced or injured in his profession or trade, or exposed to the hazard of losing his office in consequence of the slanderous words, not that his general reputation and standing in the community are affected by them. It will be recollected that the words spoken, in this class of cases, are not actionable of themselves, but that they become so in consequence of the special character of the party of whom they are spoken. The fact of his sustaining that special character, therefore, lies at the very foundation of the action. On this ground, therefore, the declaration is bad.

Judgment for defendant.

(To the same effect are *Allen v. Hillman, 12 Pick. 101; Harris v. Burley, 8 N. H. 216; Dicken v. Shepherd, 22 Md. 399.*)

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(1 Sandf. 155.)

#### IRELAND v. McGARVISH.

(Superior Court of New York City, General Term. December. 1847.)

#### SLANDER—WORDS AFFECTING PLAINTIFF IN HIS BUSINESS.

To say of the keeper of a house of public entertainment, "He is a dangerous man;" "He is a desperate man;" "I am afraid to go to his house alone;" "I am afraid of my life,"—is not actionable, as affecting his business, since the words do not relate to his business character, or charge any delinquency in his business.

Motion to set aside nonsuit and for a new trial.

Action of slander. The declaration alleged that plaintiff was the proprietor of a certain garden and house of refreshment and entertainment, by keeping which he obtained large gains and profits; and that defendant spoke and uttered to one Taggart and to others the following defamatory words of and concerning the plaintiff, and of and concerning his trade and business: "I [the said defendant meaning] am afraid to go to his [the said plaintiff meaning] house alone, [referring to the said plaintiff, and thereby and then and there mean-

ing that the said plaintiff was a dangerous man, whom the said defendant had good cause to be afraid of, and that the said defendant, for the preservation of his life, had to have some one to protect him.]” “I [the said defendant meaning] am afraid of my life, [thereby and then and there meaning that the said plaintiff was seeking his, the said defendant’s, life.]” “He [the said plaintiff meaning] is a dangerous man, [thereby and then and there meaning that the said plaintiff was a dangerous and disreputable man, whom he, the said Taggart, and others should shun as unworthy of his esteem, and that the said plaintiff was a man whom it would be dangerous to trust.]” “He [the said plaintiff meaning] is a desperate man, [thereby and then meaning as last aforesaid.]” “Look out, for it is more than likely he [the said plaintiff meaning] will take advantage of you, [thereby and then and there meaning that the said plaintiff was a dishonest and disreputable person, who would take advantage of those who should confide in him, or repose confidence in him, the said plaintiff, and that the said plaintiff was one who should be treated and looked upon as a disreputable man, likely, if an opportunity presented, to cheat and defraud.]” “He [the said plaintiff meaning] is a thief, [thereby and then and there meaning that the said plaintiff had been guilty of a crime of stealing, which rendered him amenable to the laws of the state, as and for a felony.]” At the trial, in October, 1846, a witness for plaintiff, one Robert Sears, testified that plaintiff for six years past owned and kept the Washington House and gardens at Hoboken; that in the summer of 1845, about the month of June, defendant called at a public house in Elm street, in the city of New York, where witness was employed as a bar-keeper, and commenced a conversation about plaintiff. He said he had left plaintiff’s employment. He said: “He is a dangerous man.” “He is a desperate man.” “I am afraid to go to his house alone.” “I am afraid of my life.” Witness stated that, previous to this, he was in the habit of going to plaintiff’s house at Hoboken, with his friends, for refreshments and entertainment, and had been in such habit for about four years. After this conversation with defendant the witness did not go to plaintiff’s for some time, and made up his mind that he would not go again until he had seen plaintiff; and it was not until he had called on the witness, and satisfied him of the falsity of the assertions made by defendant, that the witness renewed his visits. Upon this testimony plaintiff rested. A motion was made for a nonsuit, which was granted. Plaintiff moved to set aside the nonsuit.

VANDERPOEL, J. It cannot be pretended that the words proved to have been spoken by the defendant are actionable per se; but it is contended that they convey an imputation affecting the business of the plaintiff, and are therefore actionable. It is a well-establish-

ed rule that words are actionable which directly tend to the prejudice of any one, in his office, trade, business, or means of getting a livelihood. *Onslow v. Horne*, 3 Wils. 186; *Starkie, Sland. & L.* 180. The words, to be actionable, because they injure one in his business, must have a direct tendency to produce this effect. They must relate to his business character. In *Doyley v. Roberts*, 3 Bing. N. C. 835, it was said of an attorney, "He has defrauded his creditors, and has been horsewhipped off the course at Doncaster." The jury found that the words tended to injure the plaintiff morally and professionally, but they also found they were not spoken of him in his business of an attorney, and for that reason the court ordered a nonsuit. *Tindal, C. J.*, said the words, though spoken of an attorney, do not touch him in his profession, any more than they would touch a person in any other trade or profession. So here, though the words were spoken of a man who happened to keep a public garden and house of entertainment, they did not touch or affect him more than they would have touched or affected a person in any other business or profession. In *Southam v. Allen*, 3 Salk. 326, T. Raym. 231, the plaintiff declared that he was a keeper of a livery stable, and of the Bell Savage Inn, and that the defendant had other stables there, and that W. R., coming thither with a wagon, inquired of the defendant which was the Bell Savage Inn, who replied, "This is Bell Savage Inn; deal not with Southam, [the plaintiff,] for he is broke, and there is neither entertainment for man or horse." After verdict for the plaintiff, the judgment was affirmed. This was a charge that came directly home to the business of the plaintiff. But to say of a man, "I am afraid to go to his house alone;" "He is a desperate man;" "He is a dangerous man;" "I am afraid of my life,"—is no more calculated directly to affect his business as keeper of a house of entertainment than to prejudice his business as a merchant, a baker, or a blacksmith. All general imputations upon the morality or integrity of men, if believed by those who hear them, may possibly prejudice the business interests of those of whom they are spoken; but the law has not yet been so prolific of slander suits as to say that such general ebullitions, charging no crime, and pointing to no profession or means of livelihood, shall form the legitimate foundation of an action for defamation. Words, to be actionable, as affecting the plaintiff's business, must charge some delinquency in connection with such business. In the late case of *Van Tassel v. Capron*, 1 Denio, 250, 43 Am. Dec. 667, it was expressly held that, where words are actionable only on account of the official or professional character of the plaintiff, it is not enough that they tend to injure him in his office or calling, but they must relate to his official or business character, and impute misconduct to him in that character. As the words here are not actionable in themselves, and do not relate to the business of the plaintiff, the nonsuit was properly granted.

(See *Dauncey v. Holloway* [1901] 2 K. B. 441; *Morasse v. Brochu*, 151 Mass. 567, 575, 25 N. E. 74, 8 L. R. A. 524, 21 Am. St. Rep. 474; *Kinney v. Nash*,

3 N. Y. 177; *Lovejoy v. Whitecomb*, 174 Mass. 586, 55 N. E. 322; *Sanderson v. Caldwell*, 45 N. Y. 398, 6 Am. Rep. 105. A charge against an innkeeper that "he kept no accommodations, and a person could not get a decent meal or decent bed if he tried," has been held actionable *per se*. *Trimmer v. Hiscock*, 27 Hun, 364.)

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(18 Barb. 425.)

**SECOR v. HARRIS (in part).**

(Supreme Court of New York, General Term. September 12, 1854.)

**1. SLANDER—WORDS IMPUTING WANT OF PROFESSIONAL SKILL.**

To charge a physician with gross ignorance and unskillfulness in his profession, though in but a single act, is actionable *per se*. In such a case the law presumes damage from the very nature of the charge.

**2. SAME.**

To say of a physician in regard to his treatment of children not over three years of age, "He killed my children. He gave them tea-spoonful doses of calomel, and it killed them. They died the same day,"—is actionable.

Motion for new trial.

Argued before CRIPPEN, SHANKLAND, and MASON, JJ.

MASON, J. This is an action for slander. Upon trial of the cause, the plaintiff proved the following words, which were also alleged in the complaint: "Dr. Secor killed my children." "He gave them tea-spoonful doses of calomel, and they died. Dr. Secor gave them tea-spoonful doses of calomel, and it killed them. They did not live long after they took it. They died right off, the same day." The plaintiff was proved to be a practicing physician, and the evidence shows that he had practiced in the defendant's family, and had prescribed for the defendant's children, and that the words were spoken of him in his character of a physician. The plaintiff claimed that the words were actionable, and that he was entitled to have this branch of the case, upon the words, submitted to the jury. The judge at the circuit held that the words were not actionable, and took them from the consideration of the jury. These words spoken of the plaintiff as a physician are actionable *per se*, whatever may be said upon the question whether they impute a criminal offense. They do not impute a criminal offense, unless there is evidence, arising from the quantity of calomel which the defendant alleged that the plaintiff gave these children, from which a jury would be justified in finding an intention to kill them. One of them was three years of age, and the other one year and a half. If the natural result, which should reasonably be expected from feeding children of tender years full tea spoon doses of calomel, would be certain death, then it is not a forced construction of the words to say that the defendant intended to charge the plaintiff with an intention to kill these children in giving

them such doses. It is not necessary, however, to place the case upon this ground; for it is certainly slanderous to say of a physician that he killed these children of such tender years, by giving them tea-spoonful doses of calomel. The charge, to say the least, imports such a total ignorance of his profession as to destroy all confidence in the physician. It is a disgrace to a physician to have it believed that he is so ignorant of this most familiar and common medicine as to give such quantities thereof to such young children. The law is well settled that words published of a physician, falsely imputing to him general ignorance or want of skill in his profession, are actionable, in themselves, on the ground of presumed damage. *Starkie, Sland. & L.* 100, 110, 115, 120, 122; *Martyn v. Burlings, Cro. Eliz.* 589; *Bac. Abr. tit. "Slander," B*; *Watson v. Vanderlash, Het.* 69; *Tutty v. Alewin, 11 Mod.* 221; *Smith v. Taylor, 1 Bos. & P. (N. R.)* 196; *Sumner v. Utley, 7 Conn.* 257. I am aware that it was held in the case of *Poe v. Mondford, Cro. Eliz.* 620, that it is not actionable to say of a physician, "He hath killed a patient with physic;" and that, upon the strength of the authority of that case, it was decided in this court in *Foot v. Brown, 8 Johns.* 64, that it was not actionable to say of an attorney or counselor, when speaking of a particular suit, "He knows nothing about the suit; he will lead you on until he has undone you." These cases are not sound. The case of *Poe v. Mondford* is repudiated in *Bacon's Abridgement* as authority, and cases are referred to as holding a contrary doctrine. Volume 9, pp. 49, 50. The cases of *Poe v. Mondford* and of *Foot v. Brown* were reviewed by the supreme court of Connecticut in the case of *Sumner v. Utley, 7 Conn.* 257, with most distinguished ability, and the doctrine of those cases repudiated. In the latter case it is distinctly held that words are actionable in themselves which charge a physician with ignorance or want of skill in his treatment of a particular patient, if the charge be such as imports gross ignorance or unskillfulness. To the same effect is the case of *Johnson v. Robertson, 8 Port.* 486, where it was held that the following words, spoken of a physician in regard to his treatment of a particular case, "He killed the child by giving it too much calomel," are actionable in themselves; and such is the case of *Tutty v. Alewin, 11 Mod.* 221, where it was held to be actionable to say of an apothecary that "he killed a patient with physic." See, also, *Onslow v. Horne, 3 Wils.* 186; *Bac. Abr. tit. "Slander," B 2, vol. 9, p. 49, (Bouv. Ed.)* The cases of *Poe v. Mondford* and *Foot v. Brown* have been repudiated by the highest judicial tribunal in two of the American states, while the case of *Poe v. Mondford* seems to have been repudiated in England; and I agree with *Clinch, J.*, that the reason upon which the case is decided is not apparent. I do not go the length to say that falsehood may not be spoken of a physician's practice, in a particular case, without subjecting the party to this action. A physician may mistake the symptoms of a patient, or may misjudge as to the nature of his disease, and even as to the powers of medicine, and yet his error may be

of that pardonable kind that will do him no essential prejudice, because it is rather a proof of human imperfection than of culpable ignorance or unskillfulness; and, where charges are made against a physician that fall within this class of cases, they are not actionable without proof of special damages. 7 Conn. 257. It is equally true that a single act of a physician may evince gross ignorance, and such a total want of skill as will not fail to injure his reputation, and deprive him of general confidence. When such a charge is made against a physician, the words are actionable per se. *Id.* The rule may be laid down as a general one that, when the charge implies gross ignorance and unskillfulness in his profession, the words are actionable per se. This is upon the ground that the law presumes damage to result from the very nature of the charge. The law in such a case lays aside its usual strictness; for when the presumption of damage is violent, and the difficulty of proving it is considerable, the law supplies the defect, and, by converting presumption into proof, secures the character of the sufferer from the misery of delay, and enables him at once to face the calumny in open court. *Starkie, Sland. & L.* 581. It was well said by the learned Chief Justice Hosmer in *Sumner v. Utley*, 7 Conn. 257, that, "as a general principle, it can never be admitted that the practice of a physician or surgeon in a particular case may be calumniated with impunity, unless special damage is shown. By confining the slander to particulars, a man may thus be ruined in detail. A calumniator might follow the track of the plaintiff, and begin by falsely ascribing to a physician the killing of three persons by mismanagement, and then the mistaking an artery for a vein, and thus might proceed to misrepresent every single case of his practice, until his reputation should be blasted beyond remedy. Instead of murdering character by one stroke, the victim would be cut successively in pieces, and the only difference would consist in the manner of effecting the same result." It is true, as was said by the learned Chief Justice Hosmer in that case, the redress proposed, on the proof of special damage, is inadequate to such a case. Much time may elapse before the fact of damage admits of any evidence, and then the proof will always fall short of the mischief. In the meantime the reputation of the calumniated person languishes and dies, and hence, as we have before said, the presumption of damage being violent, and the difficulty of proving it considerable, the law supplies the defect by converting presumption of damage into proof, (*Starkie, Sland. & L.* 581;) in other words, the law presumes that damages result from the speaking of the words. In the case under consideration, the words proved impute to the plaintiff such gross ignorance of his profession, if nothing more, as would be calculated to destroy his character wherever the charge should be credited. It would be calculated to make all men speak out and say, as did the witness Richard Morris, "that it was outrageous, and the plaintiff ought not to be permitted to practice." The law will

therefore presume damages to result from the speaking of the words, and consequently hold the words actionable in themselves. The judge at the circuit erred in taking this branch of the case from the consideration of the jury, and a new trial must be granted, costs to abide the event of the action.

New trial granted.

CRIPPEN, J., concurred. SHANKLAND, J., dissented.

(See also *Cruikshank v. Gordon*, 118 N. Y. 178, 23 N. E. 457; *Mattice v. Wilcox*, 147 N. Y. 624, 42 N. E. 270 [charge against attorney]; *De Pew v. Robinson*, 95 Ind. 109; *Fitzgerald v. Redfield*, 51 Barb. 484 [charge against a mason]; *Lumby v. Allday*, 1 Cramp. & J. 301. In *Gauvreau v. Superior Pub. Co.*, 62 Wis. 403, 22 N. W. 726, the rule is stated as follows, as regards physicians: "A physician is only required to possess the ordinary knowledge and skill of his profession. He may possess these, and much more, and yet be unable to accurately diagnose every disease presented, or always foretell the exact power and effect of medicine or treatment prescribed. So long, therefore, as the words employed in stating the conduct of the physician in a particular case only impute to him such ignorance or want of skill as is compatible with the ordinary or general knowledge and skill in the same profession, they are not actionable *per se*. But where the words so employed in detailing the action of the physician in a particular case, taken together, are such as fairly impute to him gross ignorance and unskillfulness in such matters as men of ordinary knowledge and skill in the profession should know and do, then they are actionable *per se*." Cf. *Crane v. Darling*, 71 Vt. 295, 44 Atl. 359.)

## B. SLANDER WITH SPECIAL DAMAGE.

(17 N. Y. 54, 72 Am. Dec. 420.)

TERWILLIGER v. WANDS (in part).

(Court of Appeals of New York. March, 1858.)

### 1. SLANDER—SPECIAL DAMAGE—REPETITION BY OTHER PERSONS.

Damages caused by the repetition of defamatory words by the person to whom they were spoken, without proper occasion for repeating them, are not the natural and legal consequence of the first speaking of them, and the person so repeating them is alone liable for such damages.

### 2. SAME.

Illness and inability to labor, caused by the effect on one's mind of defamatory words reported to him to have been spoken of him, are not special damages for which he can maintain an action of slander. Only injuries affecting the reputation are the subject of the action. The words must in fact disparage the character, and this disparagement must be evidenced by some positive loss arising therefrom, directly and legitimately, as a fair and natural result.

Appeal from Supreme Court, General Term, Fifth District.

Action for slander. The complaint alleged the speaking by defendant of words charging plaintiff with lewd and unchaste conduct, and also alleged special damage therefrom. At the trial, several witnesses for plaintiff, among them La Fayette Wands and John S. Neiper, testified to the speaking of such words by defendant, charging plaintiff with continued unlawful intercourse with a Mrs. Fuller at her house. The only evidence that what defendant said was communicated to plaintiff was that given by the witness Neiper, who, having testified to the speaking of such words by defendant to him in the beginning of May, 1852, further testified that he had married the sister of Mrs. Fuller, and that he was an intimate friend of plaintiff; that in May, 1852, he communicated to plaintiff what defendant had said to him, and in June of the same year, while hoeing corn with plaintiff, talked over what La Fayette Wands had said defendant had told him; that the story of what La Fayette Wands had said defendant told him was all over the country; that the witness told plaintiff what the report was, that he went to Mrs. Fuller's for the purpose of having connection with her; that plaintiff felt bad, threw down his hoe, and left the field; that plaintiff had always worked with the witness before that, and he had been in middling good health; that plaintiff after that appeared melancholy, and looked bad, pale, and sick; his appetite was poor, and he had to hire more help. Nancy Harpburn, a daughter of the plaintiff, testified that she heard the report that La Fayette Wands had circulated the 1st of May, 1852; that she remembered, when Neiper hoed corn there, of plaintiff's getting worse, going into the house, and to bed; that she remarked a great difference in his appearance, not resting at night; did not discover any other difference; he did not pursue his work as formerly; this debility commenced in June; heard of Wands' report in May or June; first heard of its coming through La Fayette Wands, in June, about the middle of hoeing time, and then remarked a difference in his appearance; he grew worse all through the summer. On cross-examination she testified that she heard some slight reports through the winter that he was very intimate, and more than was proper, with Mrs. Fuller, and had frequent conversations with her father about it; that she knew that Mr. Fuller made such charges during the winter and summer, and that she talked with her father about what Fuller had said; that a lady told her in May it was reported Fuller had caught her father there, and she told her father in June; that Dr. Price prescribed for the plaintiff in June and July. Dr. Price testified that he called to see plaintiff as a patient in May or June, 1852; that plaintiff was debilitated with what appeared to be mental difficulty; that he judged, from what plaintiff's friends said, that plaintiff's health was impaired so that he could not labor on his farm; that plaintiff was out of health through the summer. George Terwilliger, a son of plaintiff, testified that he saw plaintiff frequently along in May and June, 1852; that his

health in the winter was good, and began to decline about the 1st of May, and became worse after that, and during the summer he was entirely prostrated; that he became worse, and unable to attend to his business, and neglected it; his crops were neglected and fences down; his corn suffered for want of hoeing; that the plaintiff appeared like a person worn down by sickness in May, June, and July; he was a farmer, and his business required his personal attention every day.

Plaintiff having rested, defendant moved for a nonsuit on the grounds: (1) That the words were not spoken by defendant to the plaintiff, nor authorized by him to be communicated to plaintiff; (2) that there was no evidence that the damages, if any, proved, were occasioned by the speaking of the words by the defendant. The court granted the motion, and judgment was entered against plaintiff, and was affirmed on appeal to the general term. Plaintiff appealed from the judgment of affirmance by the general term.

**STRONG, J.** The words spoken by the defendant not being actionable of themselves, it was necessary, in order to maintain the action, to prove that they occasioned special damages to the plaintiff. The special damages must have been the natural, immediate, and legal consequence of the words. *Starkie, Sland. & L. (Wend. 2d Ed.) 203; 2 Starkie, Sland. & L. 62, 64; Beach v. Ranney, 2 Hill, 309; Crain v. Petrie, 6 Hill, 523, 41 Am. Dec. 765; Kendall v. Stone, 5 N. Y. 14.* Where words are spoken to one person, and he repeats them to another, in consequence of which the party to whom they are spoken sustains damages, the repetition is, as a general rule, a wrongful act, rendering the person repeating them liable in like manner as if he alone had uttered them. The special damages in such a case are not a natural, legal consequence of the first speaking of the words, but of the wrongful act of repeating them, and would not have occurred but for the repetition, and the party who repeats them is alone liable for the damages. *Ward v. Weeks, 7 Bing. 211; Hastings v. Palmer, 20 Wend. 226; Keenholts v. Becker, 3 Denio, 346; Stevens v. Hartwell, 11 Metc. (Mass.) 542.* These views dispose of this case as to the right of action in respect to all the words but those spoken to the witness Neiper, as there is no proof as to the circumstances under which they were repeated. In the absence of evidence of those circumstances, the general rule, that a repetition of slanderous words is wrongful, applies; hence any damages which resulted from repeating them are a consequence of that wrong, and not a natural, immediate, and legal effect of the original speaking of the words by the defendant.

Assuming that illness and inability to labor constitute such special damages as will support an action, the evidence in this case wholly fails to show that the damages were a consequence of the words spoken by the defendant to Neiper. The proof is that they were mainly the result of the repetition of the words spoken to the wit-

ness Wands, and reports of other persons. It was not until a considerable time after the plaintiff was informed by Neiper what the defendant had said to the latter that he began to be ill, and his illness commenced immediately after the communication to him of what had been said by La Fayette Wands. At that time, the plaintiff had been informed of charges made by Fuller to the same effect, and it is a fair conclusion upon the proof that he then knew what the witness Wands says was a fact, that "the story was all over the country." Under these circumstances, it is impossible to conclude that what the defendant stated to Neiper produced the damages. 1 Starkie, Sland. & L. 205; *Vicars v. Wilcocks*, 8 East, 1; *Crain v. Petrie*, 6 Hill, 522, 41 Am. Dec. 765.

But there is another ground upon which the judgment must be affirmed. The special damages relied upon are not of such a nature as will support the action. The action for slander is given by the law as a remedy for "injuries affecting a man's reputation or good name by malicious, scandalous, and slanderous words, tending to his damage and derogation." 3 Bl. Comm. 123; Starkie, Sland. & L. Prelim. Obs. 22-29; 1 Starkie, Sland. & L. 17, 18. It is injuries affecting the reputation only which are the subject of the action. In the case of slanderous words actionable per se, the law, from their natural and immediate tendency to produce injury, adjudges them to be injurious, though no special loss or damage can be proved. "But with regard to words that do not apparently and upon the face of them import such defamation as will of course be injurious, it is necessary that the plaintiff should aver some particular damage to have happened." 3 Bl. Comm. 124. As to what constitutes special damages, Starkie mentions the loss of a marriage; loss of hospitable gratuitous entertainment; preventing a servant or bailiff from getting a place; the loss of customers by a tradesman; and says that, in general, whenever a person is prevented by the slander from receiving that which would otherwise be conferred upon him, though gratuitously, it is sufficient. 1 Starkie, Sland. & L. 195, 202; *Cooke*, Defam. 22-24. In *Olmsted v. Miller*, 1 Wend. 506, it was held that the refusal of civil entertainment at a public house was sufficient special damage. So in *Williams v. Hill*, 19 Wend. 305, was the fact that the plaintiff was turned away from the house of her uncle, and charged not to return until she had cleared up her character. So, in *Beach v. Ranney*, supra, was the circumstance that persons who had been in the habit of doing so, refused longer to provide fuel, clothing, etc. 2 Starkie, Ev. 872, 873. These instances are sufficient to illustrate the kind of special damage that must result from defamatory words not otherwise actionable to make them so; they are damages produced by or through impairing the reputation.

It would be highly impolitic to hold all language, wounding the feelings, and affecting unfavorably the health and ability to labor, of another, a ground of action; for that would be to make the right of action

depend often upon whether the sensibilities of a person spoken of are easily excited or otherwise; his strength of mind to disregard abusive, insulting remarks concerning him; and his physical strength and ability to bear them. Words which would make hardly an impression on most persons, and would be thought by them, and should be by all, undeserving of notice, might be exceedingly painful to some, occasioning sickness and an interruption of ability to attend to their ordinary avocations. There must be some limit to liability for words not actionable *per se*, both as to the words and the kind of damages; and a clear and wise one has been fixed by the law. The words must be defamatory in their nature; and must in fact disparage the character; and this disparagement must be evidenced by some positive loss arising therefrom, directly and legitimately, as a fair and natural result.

In the present case the words were defamatory, and the illness and physical prostration of the plaintiff may be assumed, so far as this part of the case is concerned, to have been actually produced by the slander; but this consequence was not, in a legal view, a natural, ordinary one, as it does not prove that the plaintiff's character was injured. The slander may not have been credited by or had the slightest influence upon any one unfavorable to the plaintiff; and it does not appear that anybody believed it or treated the plaintiff any different from what they would otherwise have done on account of it. The cause was not adapted to produce the result which is claimed to be special damages. Such an effect may, and sometimes does, follow from such a cause, but not ordinarily; and the rule of law was framed in reference to common and usual effects, and not those which are accidental and occasional.

It is true that this element of the action for slander, in the case of words not actionable of themselves,—that the special damages must flow from impaired reputation,—has been overlooked in several modern cases, and loss of health, and consequent incapacity to attend to business, held sufficient special damage, (*Bradt v. Towsley*, 13 Wend. 253; *Fuller v. Fenner*, 16 Barb. 333;) but these cases are a departure from principle, and should not be followed. If such consequences were sufficient, it would not be necessary to allege in the complaint or prove that the words were spoken in the presence of a third person. If spoken directly to the plaintiff, in the presence of no one else, he might himself, under the recent law allowing parties to be witnesses, prove the words and the damages, and be permitted to recover. It has been regarded as necessary to an action that the words should be published by speaking them in the presence of some person other than the plaintiff, both in the case of words actionable and those not actionable. 1 Starkie, *Sland. & L.* 360; 2 Starkie, *Sland. & L.* 12; Cooke, *Defam.* 87.

Where there is no proof that the character has suffered from the words, if sickness results, it must be attributable to apprehension of loss of character; and such fear of harm to character, with resulting sickness

and bodily prostration, cannot be such special damage as the law requires for the action.

ROOSEVELT, J., dissented. All the other judges concurring.

Judgment affirmed.

(The law in regard to liability for the *repetition* of defamatory words is well stated in *Schoepflin v. Coffey*, 162 N. Y. 12, 56 N. E. 502, as follows: "One who utters a slander, or prints and publishes a libel, is not responsible for its voluntary and unjustifiable repetition, without his authority or request, by others over whom he has no control, and who thereby make themselves liable to the person injured, and such repetition cannot be considered in law a necessary, natural, and probable consequence of the original slander or libel. The remedy in such a case would be against the party who printed and published the words thus spoken, and not against the one speaking them, as a person is not liable for the independent illegal acts of third persons in publishing matters which may have been uttered by him, unless they are procured by him to be published, or he performed some act which induced their publication. *Ward v. Weeks*, 7 Bing. 211; *Olmsted v. Brown*, 12 Barb. 657. The repetition of defamatory language by another than the first publisher is not a natural consequence of the first publication, and therefore the loss resulting from such repetition is not generally attributable to the first publisher. This rule is based upon the principle that every person who repeats a slander is responsible for the damage caused by such repetition, and that such damage is not the proximate and natural consequence of the first publication of the slander." In this case the repetition was by a *libel* [publication in a newspaper], but the same principle would apply where the repetition was by spoken words. *S. P. Hastings v. Stetson*, 126 Mass. 329, 30 Am. Rep. 683; *Elmer v. Fessenden*, 151 Mass. 359, 24 N. E. 208, 5 L. R. A. 724; *Davis v. Starrett*, 97 Me. 568, 55 Atl. 516; *Nicholson v. Rust* [Ky.] 52 S. W. 933; *Merchants' Ins. Co. v. Buckner*, 98 Fed. 222, 39 C. C. A. 19.

As to "slander with special damage," see also *Roberts v. Roberts*, 5 B. & S. 384, and *Moody v. Baker*, 5 Cow. 351, in the text, *supra*, pp. 60, 109.

It is also not actionable per se to call a man a blackleg [*Barnett v. Allen*, 3 H. & N. 376]; a liar [*Kimmis v. Stiles*, 44 Vt. 351]; a villain, a rascal, and a cheater [*Nelson v. Borchenius*, 52 Ill. 236]; a rogue or a scoundrel [*Quinn v. O'Gara*, 2 E. D. Smith, 388; *Winter v. Sumvalt*, 3 H. & J. 38; *Ward v. Weeks*, 7 Bing. 211].

The "special damage" must be of a pecuniary nature. *Pollard v. Lyon*, 91 U. S. 225, 237, 23 L. Ed. 308; *Chamberlain v. Boyd*, 11 Q. B. D. 407. See *Bassell v. Elmore*, 48 N. Y. 561; *Pettibone v. Simpson*, 66 Barb. 492; *Lynch v. Knight*, 9 H. L. C. 577; *Davies v. Solomon*, L. R. 7 Q. B. 112; *Allsop v. Allsop*, 5 H. & N. 534; *Shafer v. Ahalt*, 48 Md. 171, 30 Am. Rep. 456.)

## II. LIBEL.

(68 Me. 295, 28 Am. Rep. 50.)

TILLSON v. ROBBINS (in part).

(Supreme Judicial Court of Maine. June 7, 1878.)

## 1. LIBEL—WORDS EXPOSING TO PUBLIC HATRED AND CONTEMPT.

For the publication, by writing or printing, of a charge such as, if believed, would naturally tend to expose a person to public hatred, contempt, or ridicule, or to deprive him of the benefits of public confidence and social intercourse, an action may be maintained by him, without allegations of special damage, or of any fact to make such publication import a charge of crime.

## 2. DIFFERENCE BETWEEN LIBEL AND SLANDER.

There are many kinds of charges which would not be actionable per se if spoken, but are so if written or printed. Illustrations of such charges.

On exceptions.

Action by Davis Tillson against Levi M. Robbins for libel. The declaration alleged, in the first count, the publication by defendant in a certain newspaper, of and concerning plaintiff, of the following words: "The Hurricane Vote. Again we have to chronicle most atrocious corruption, intimidation, and fraud in the Hurricane Island vote, for which Davis Tillson is without doubt responsible, as he was last year;" and in the second count the publication by defendant of a libel of and concerning plaintiff in his business of merchant and contractor, in the same words, with the addition of the following: "Hurricane Island is all owned by Davis Tillson, an intense partisan and an unscrupulous politician. It is leased to government, and contains quarries from which is taken granite for public buildings. This granite is bought by government of Tillson, and is there cut by men who receive about \$3.50 per day. On all expenditures Tillson has a gratuity of 15 per cent., for which he renders no equivalent, unless the lease of the island and its facilities be deemed such." Each count contained innuendoes, explaining these words as meaning that plaintiff had been guilty of the crime of corruption, intimidation, and fraud at an election held on the island mentioned; but there was no averment of the fact of such election, nor any colloquium that the words were used in reference thereto. Defendant demurred to the declaration. The demurrer was overruled, and defendant alleged exceptions.

BARROWS, J. The defendant's criticisms upon the writ to which he has demurred would be pertinent if the case were one of mere verbal slander. But in respect to the supposed requirement that, in order to maintain an action for damages where no crime is imputed, special damage must be alleged and proved, a distinction has been long and uniformly maintained between mere words and written or printed slan-

der. Holt, Libel, (1st Am. Ed.) 218-223. Much which, if only spoken, might be passed as idle blackguardism, doing no discredit save to him who utters it, when invested with the dignity and malignity of print is capable, by reason of its permanent character and wide dissemination, of inflicting serious injury.

The cases, ancient and modern, where this distinction has been regarded, are numerous. A reference to a few of them will serve all the purposes of a more elaborate discussion. Lord Holt says: "Scandalous matter is not necessary to make a libel. It is enough if the defendant induce an ill opinion to be had of the plaintiff, or to make him contemptible and ridiculous." *Cropp v. Tilney*, 3 Salk. 226.

To say of a man, "He is a dishonest man," is not actionable without special damage alleged and proved; but to publish so, or to put it upon posts, is actionable. *Austin v. Culpeper*, Skin. 124.

In *Villers v. Monsley*, 2 Wils. 403, the court say: "There is a distinction between libels and words; a libel is punishable both criminally and by action, when speaking the words would not be punishable either way. For speaking the words 'rogue' and 'rascal' of any one an action will not lie, but if those words were written and published of any one an action will lie. If one man should say of another that he has the itch, without more, an action would not lie; but if he should write those words of another, and publish them maliciously, as in the present case, no doubt but the action well lies."

In another case, where the defendant had applied the epithet "villain" to the plaintiff in a letter to a third person, and the plaintiff, though alleging, failed to prove, any special damage, the court ordered judgment for the plaintiff, expressing the opinion that "any words written and published, throwing contumely on the party, are actionable." *Bell v. Stone*, 1 Bos. & P. 331.

In one of Christian's notes to Blackstone mention is made of a case where a young lady recovered £4,000 damages for reflections upon her chastity, published in a newspaper, though she could not, under English laws, without alleging special damages, such as loss of marriage or the like, have maintained an action for verbal slander containing the grossest aspersions upon her honor.

In *J'Anson v. Stuart*, 1 Term R. 748, it was held that to print of any person that he is a swindler is a libel and actionable; for it is not necessary, in order to maintain an action for libel, that the imputation should be one which, if spoken, would be actionable as slander.

In *Thorley v. Kerry*, 4 Taunt. 355, the words of the alleged libel, as declared on, were: "I pity the man [meaning the plaintiff] who can so far forget what is due to himself and others as, under the cloak of religion, to deal out envy, hatred, malice, uncharitableness, and falsehood." Mansfield, chief justice of the common pleas, pronouncing judgment for the plaintiff in the exchequer chamber at Easter term, 1812, while he declared himself personally disposed to repudiate the dis-

inction between written and unwritten scandal, says: "I do not now recapitulate the cases, but we cannot, in opposition to them, venture to lay down at this day that no action can be maintained for any words written for which an action could not be maintained if spoken." For later English cases maintaining the same doctrine, see *McGregor v. Thwaites*, 3 Barn. & C. 24; *Clement v. Chivis*, 9 Barn. & C. 172; *Woodard v. Dowsing*, 2 Man. & R. 74; *Shipley v. Todhunter*, 7 Car. & P. 680; *Parmiter v. Coupland*, 6 Mees. & W. 105.

The American cases on this point follow in the same line with the English. *Runkle v. Meyer*, 3 Yeates, 518, 2 Am. Dec. 393; *McCorkle v. Binns*, 5 Bin. 345, 6 Am. Rep. 420; *McClurg v. Ross*, 5 Bin. 218; *Dexter v. Spear*, 4 Mason, 115, Fed. Cas. No. 3,867; *Dunn v. Winters*, 2 Humph. 512; *Clark v. Binney*, 2 Pick. 113, 116; *Stow v. Converse*, 3 Conn. 325, 8 Am. Dec. 189; *Hillhouse v. Dunning*, 6 Conn. 391; *Shelton v. Nance*, 7 B. Mon. 128; *Mayrant v. Richardson*, 1 Nott & McC. 347, 9 Am. Dec. 707; *Colby v. Reynolds*, 6 Vt. 489, 27 Am. Dec. 574.

It is true that some able jurists agree with Mansfield, C. J., in doubting whether this distinction between verbal and written or printed slander is well founded in principle, while they recognize the force of the authorities which sustain it. Others maintain it upon reason as well as authority. The subject is discussed with numerous references to cases, old and new, English and American, in a note to *Steele v. Southwick*, in 1 Hare & W. Lead. Cas. (5th Ed.) 123.

*Steele v. Southwick* was an early case in New York, decided in 1812, and reported in 9 Johns. 214. It was there held that the published words complained of, if they did not import a charge of perjury in the legal sense, were nevertheless libelous, as holding the plaintiff up to contempt and ridicule, as regardless of his obligations as a witness and unworthy of credit, and that they were consequently actionable. We concur entirely in the remarks of the court that "to allow the press to be the vehicle of malicious ridicule of private character would soon deprave the moral taste of the community, and render the state of society miserable and barbarous. It is true that such publications are also indictable as leading to a breach of the peace, but the civil remedy is equally fit and appropriate." We do not mean to say that every indictable libel would be a good foundation for a civil action.

It is sufficient to dispose of this demurrer to hold that, in an action for written or printed slander, though no special damage is alleged, and no averments of such extrinsic facts as might be requisite to make the publication in question import a charge of crime are made, the action is nevertheless maintainable if the published charge is such as, if believed, would naturally tend to expose the plaintiff to public hatred, contempt, or ridicule, or deprive him of the benefits of public confidence and social intercourse. It cannot be successfully contended that the statements alleged in this writ to have been published by the defendant

in his newspaper, of and concerning the plaintiff, would not, if believed, tend strongly to deprive him of public confidence, and expose him to public hatred and contempt.

Exceptions overruled.

APPLETON, C. J., and WALTON, DICKERSON, DANFORTH, and PETERS, JJ., concurred.

(Valuable cases on the nature of a libel are *Palmer v. Mahin*, 120 Fed. 737, 57 C. C. A. 41; *Mattice v. Wilcox*, 147 N. Y. 624, 42 N. E. 270; *Gates v. New York Recorder Co.*, 155 N. Y. 228, 49 N. E. 769; *Krug v. Pitass*, 162 N. Y. 154, 56 N. E. 526, 76 Am. St. Rep. 317; *Williams v. Fuller* [Neb.] 94 N. W. 118; *Quinn v. Prudential Ins. Co.*, 116 Iowa, 522, 90 N. W. 349; *Elmergreen v. Horn*, 115 Wis. 385, 91 N. W. 973; *Bradley v. Cramer*, 59 Wis. 309, 18 N. W. 268, 48 Am. Rep. 511; *Lindley v. Horton*, 27 Conn. 58; *Barr v. Moore*, 87 Pa. 385, 30 Am. Rep. 367.)

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(121 N. Y. 199, 23 N. E. 1127, 8 L. R. A. 214, 18 Am. St. Rep. 810.)

MOORE v. FRANCIS et al.

(Court of Appeals of New York. April 15, 1890.)

**LIBEL**—WORDS AFFECTING PLAINTIFF IN HIS OCCUPATION—IMPUTING INSANITY.

The publication in a newspaper of a statement that plaintiff, employed as teller in a bank, became mentally deranged by reason of overwork, and that while in that condition he made injurious statements regarding the bank's affairs, which caused it trouble, is libelous per se, as tending to injure him in his employment.

Appeal from Supreme Court, General Term, Third Department.

Action by Amasa R. Moore against John M. Francis and others for libel. Verdict for defendants, and from a judgment of the general term affirming the judgment on the verdict, and an order denying a motion to set aside the same, and for a new trial, plaintiff now appeals.

ANDREWS, J. The alleged libelous publication which is the subject of this action was contained in the *Troy Times* of September 15, 1882, in an article written on the occasion of rumors of trouble in the financial condition of the Manufacturers' National Bank of Troy, of which the plaintiff was at the time of the publication, and for 18 years prior thereto had been, teller. The rumors referred to had caused a "run" upon the bank; and it is claimed by the defendants, and it is the fair conclusion from the evidence, that the primary motive of the article was to allay public excitement on the subject. That part of the publication charged to be libelous is as follows: "Several weeks ago it was rumored that Amasa Moore, the teller of the bank, had tendered his resignation. Rumors at once began to circulate. A reporter inquired of Cashier Wellington if it was true that the teller had resigned, and received in reply

the answer that Mr. Moore was on his vacation. More than this the cashier would not say. A rumor was circulated that Mr. Moore was suffering from overwork, and that his mental condition was not entirely good. Next came reports that Cashier Wellington was financially involved, and that the bank was in trouble. A Times reporter at once sought an interview with President Weed of the bank, and found him and Directors Morrison, Cowee, Bardwell, and others in consultation. They said that the bank was entirely sound, with a clear surplus of \$100,000; that there had been a little trouble in its affairs, occasioned by the mental derangement of Teller Moore; and that the latter's statements, when he was probably not responsible for what he said, had caused some bad rumors." The complaint is in the usual form, and charges that the publication was false and malicious, made with intent to injure the plaintiff in his good name and credit in his occupation as bank teller, and to cause it to be believed that, by reason of mental derangement, he had become incompetent to discharge his duties, and had caused injury to the bank, etc. The court on the trial was requested by the plaintiff's counsel to rule, as a question of law, that the publication was libelous. The court refused, but submitted the question to the jury. The jury found a verdict for the defendants, and, as the verdict may have proceeded upon the finding that the article was not libelous, the question is presented whether it was *per se* libelous. If it was, the court erred in leaving the question to the jury.

It is the settled law of this state that, in a civil action for libel, where the publication is admitted, and the words are unambiguous and admit of but one sense, the question of libel or no libel is one of law, which the court must decide. *Snyder v. Andrews*, 6 Barb. 43; *Matthews v. Beach*, 5 Sandf. 256; *Hunt v. Bennett*, 19 N. Y. 173; *Lewis v. Chapman*, 16 N. Y. 369; *Kingsbury v. Bradstreet Co.*, 116 N. Y. 211, 22 N. E. 365. Of course, an error in submitting the question to the jury would be harmless if their finding that the publication was not libelous was in accordance with its legal character. The import of the article, so far as it bears upon the plaintiff, is plain and unequivocal. The words amount to a distinct affirmation—First, that the plaintiff was teller of the bank; second, that while acting in this capacity he became mentally deranged; third, that the derangement was caused by overwork; fourth, that while teller, and suffering from this mental alienation, he made injurious statements in respect to the bank's affairs which occasioned it trouble. The cases of actionable slander were defined by Chief Justice De Grey in the leading case of *Onslow v. Horne*, 3 Wils. 177; and the classification made in that case has been generally followed in England and this country. According to this classification, slanderous words are those which (1) import a charge of some punishable crime; or (2) impute some offensive disease which would tend to deprive a person of society; or (3) which tend to injure a party in his trade, occupation, or business; or (4) which have produced

some special damage. Defamatory words, in common parlance, are such as impute some moral delinquency or some disreputable conduct to the person of whom they are spoken. Actions of slander, for the most part, are founded upon such imputations. But the action lies in some cases where the words impute no criminal offense; where no attack is made upon the moral character, nor any charge of personal dishonor. The first and larger class of actions are those brought for the vindication of reputation, in its strict sense, against damaging and calumnious aspersions. The other class fall, for the most part at least, within the third specification in the opinion of Chief Justice De Grey, of words which tend to injure one in his trade or occupation. The case of words affecting the credit of a trader, such as imputing bankruptcy or insolvency, is an illustration. The action is maintainable in such a case, although no fraud or dishonesty is charged, and although the words were spoken without actual malice. The law allows this form of action not only to protect a man's character as such, but to protect him in his occupation, also, against injurious imputations. It recognizes the right of a man to live, and the necessity of labor, and will not permit one to assail by words the pecuniary credit of another, except at the peril, in case they are untrue, of answering in damages. The principle is clearly stated by Bayley, J., in *Whittaker v. Bradley*, 7 Dowl. & R. 649; "Whatever words have a tendency to hurt, or are calculated to prejudice, a man who seeks his livelihood by any trade or business, are actionable." Where proved to have been spoken in relation thereto, the action is supported; and unless the defendant shows a lawful excuse, the plaintiff is entitled to recover without allegation or proof of special damage, because both the falsity of the words and resulting damage are presumed. *Craft v. Boite*, 1 Saund. 243, note; *Steele v. Southwick*, 1 Amer. Lead. Cas. 135.

The authorities tend to support the proposition that spoken words imputing insanity are actionable per se when spoken of one in his trade or occupation, but not otherwise, without proof of special damage. *Morgan v. Lingen*, 8 Law T. (N. S.) 800; *Joannes v. Burt*, 6 Allen, 236, 83 Am. Dec. 625. The imputation of insanity in a written or printed publication is a fortiori libelous where it would constitute slander if the words were spoken. Written words are libelous in all cases where, if spoken, they would be actionable; but they may be libelous where they would not support an action for oral slander. There are many definitions of "libel." The one by Hamilton in his argument in *People v. Croswell*, 3 Johns. Cas. 354, viz., "a censorious or ridiculing writing, picture, or sign, made with mischievous and malicious intent towards government, magistrates, or individuals," has often been referred to with approval. But, unless the word "censorious" is given a much broader signification than strictly belongs to it, the definition would not seem to comprehend all cases of libelous words. The word "libel," as expounded in the cases, is not limited to written or printed words

which defame a man, in the ordinary sense, or which impute blame or moral turpitude, or which criticise or censure him. In the case before referred to, words affecting a man injuriously in his trade or occupation may be libelous although they convey no imputation upon his character. Words, says Starkie, are libelous if they affect a person in his profession, trade, or business, "by imputing to him any kind of fraud, dishonesty, misconduct, incapacity, unfitness, or want of any necessary qualification in the exercise thereof." Starkie, *Sland. & L.* § 188. The cases of libel founded upon the imputation of insanity are few. The declaration in *Morgan v. Lingen*, *supra*, contained a count for libel, and also for verbal slander. The alleged libel was a letter written by the defendant in which he states that "he had no doubt that the plaintiff's mind was affected, and that seriously," and also that "she had a delusion," etc. It appeared that the defendant had also orally stated, in substance, the same thing. It was claimed that the writing was justified. The plaintiff was a governess. Martin, B., in summing up to the jury, said that "a statement in writing that a lady's mind is affected, and that seriously, is, without explanation, *prima facie* a libel." In respect to the slander, he said "he thought there was no evidence of any special damage. The jury must, therefore, consider whether the defendant ever intended to use the expressions he did with reference to the plaintiff's profession of governess." In *Perkins v. Mitchell*, 31 Barb. 465, it was held to be libelous to publish of another "that he is insane, and a fit person to be sent to the lunatic asylum;" Emott, J., saying: "Upon this point the case is clear." *Rex v. Harvey*, 2 Barn. & C. 257, was an information for libel for publishing in a newspaper that the king "labored under mental insanity, and it stated that the writer communicated the fact from authority." The judge charged that the publication was a libel, and the charge was held to be correct. The foregoing are the only cases we have noticed upon the point whether a written imputation of insanity constitutes a libel. Several of the text-writers state that to charge in writing that a man is insane is libelous. Add. *Torts*, 168; *Townsh. Sland. & L.* § 177; Starkie, *Sland. & L.* § 164; Odgers, *Sland. & L.* p. 23.

The publication now in question is not simply an assertion that the plaintiff is or has been affected with "mental derangement," disconnected with any special circumstances. The assertion was made to account for the trouble to which the bank had been subjected by reason of injurious statements made by the plaintiff while in its employment. Words, to be actionable on the ground that they affect a man in his trade or occupation, must, as is said, touch him in such trade or occupation; that is, they must be shown, directly or by inference, to have been spoken of him in relation thereto, and to be such as would tend to prejudice him therein. *Sanderson v. Caldwell*, 45 N. Y. 405, 6 Am. Rep. 105, and cases cited. The publication did, we think, touch the plaintiff in respect to his occupation as bank teller. It imputed mental derangement while en-

gaged in his business as teller, which affected him in the discharge of his duties. The words conveyed no imputation upon the plaintiff's honesty, fidelity, or general capacity. They attributed to him a misfortune brought upon him by an overzealous application in his employment. While the statement was calculated to excite sympathy, and even respect, for the plaintiff, it nevertheless was calculated, also, to injure him in his character and employment as a teller. On common understanding, mental derangement has usually a much more serious significance than mere physical disease. There can be no doubt that the imputation of insanity against a man employed in a position of trust and confidence, such as that of a bank teller, whether the insanity is temporary or not, although accompanied by the explanation that it was induced by overwork, is calculated to injure and prejudice him in that employment, and especially where the statement is added that, in consequence of his conduct in that condition, the bank has been involved in trouble. The directors of a bank would naturally hesitate to employ a person as teller whose mind had once given way under stress of similar duties, and run the risk of a recurrence of the malady. The publication was, we think, defamatory, in a legal sense, although it imputed no crime, and subjected the plaintiff to no disgrace, reproach, or obloquy, for the reason that its tendency was to subject the plaintiff to temporal loss, and deprive him of those advantages and opportunities as a member of the community which are open to those who have both a sound mind and a sound body. The trial judge, therefore, erred in not ruling the question of libel as one of law. The evidence renders it clear that no actual injury to the plaintiff was intended by the defendants; but it is not a legal excuse that defamatory matter was published accidentally or inadvertently, or with good motives, and in an honest belief in its truth.

The judgment should be reversed, and a new trial granted.

All concur.

("To publish of a minister that he is immoral; of a lawyer that he is an ignoramus, a drunkard, or a cheat; of an architect or a teller of a bank that he is crazy; of a physician that he is a humbug, or a quack, or a butcher, or a blockhead, or a quacksalver, or an empiric, or a mountebank, or that he is no scholar, or that his diploma is worthless,—has been held actionable *per se* as touching his vocation." *Bornmann v. Star Co.*, 174 N. Y. 212, 219, 66 N. E. 723, citing many cases.)

(117 Mass. 539.)

**HOMER v. ENGELHARDT.**

(Supreme Judicial Court of Massachusetts. May 8, 1875.)

**LIBEL—WORDS AFFECTING PLAINTIFF IN HIS BUSINESS.**

The publication in a newspaper of a notice to the public that plaintiff, a saloon-keeper, to get rid of a just claim in court, set up as a defense an existing prohibitory liquor law, under which no action for the price of liquors sold in violation thereof could be maintained, is not libelous, as he had a legal right to make such defense.

**Appeal from Superior Court.**

Action of tort by Valéntine Homer against Michael Engelhardt for libel. The declaration alleged that defendant caused to be published in a certain newspaper, printed in the German language, published in Boston, "a false and malicious libel concerning plaintiff, a copy of which is hereto annexed, as follows: 'Dem deutschen Publicum zur Nachricht dass der Wirth Valentine Homer, 1863 Washington Str., um einer gerechten Forderung zu entgehen, als Vertheidigung vor Gericht das bestehende Liquör-Gesetz anführte. Wir halten es für unsere Pflicht solche Fälle zu publiziren um Bierbrauer und Liquörhändler zu warnen. M. Engelhardt & Co,'— which, translated into the English language, is as follows: 'Information to the German public. The saloon-keeper, Valentine Homer, No. 1863 Washington street, to get rid of a just claim in court, set up as a defense the existing prohibitory liquor law. We feel it our duty to make such conduct publicly known, in order to caution beer-brewers and liquor dealers. M. Engelhardt & Co.' " Defendant demurred to the declaration, on the ground that it did not state a legal cause of action, inasmuch as it contained no actionable words or other cause of action. The demurrer was sustained, and judgment ordered for defendant. Plaintiff appealed.

ENDICOTT, J. No action can be maintained in this commonwealth for the price of liquor sold in violation of law. St. 1869, c. 415, § 63. If such action is brought, it is the right of the defendant to set up in his answer this provision of the statute. It is a perfectly legitimate and legal defense, and stands as other defenses stand which the law interposes to defeat what, under other circumstances, would be a just demand. This publication does not charge that the plaintiff falsely, or even unsuccessfully, set up as a defense the existing prohibitory law. The gist of the damage is simply that he did set up such a defense. The plaintiff having the right to make this defense, it is not libelous to publish the statement that he had done so. The demurrer was rightly sustained in the court below.

Judgment affirmed.

(It is not libelous to charge a man with doing that which he may do lawfully [Foot v. Pitt, 83 App. Div. 76, 82 N. Y. Supp. 464]; as, e. g., with pleading

the statute of limitations [Bennett v. Williamson, 4 Sandf. 60]; or with being a hog, because he would not trade at home and build up his own town [Urban v. Helmick, 15 Wash. 155, 45 Pac. 747; see Goldberger v. Philadelphia Grocer Pub. Co. (C. C.) 42 Fed. 42].)

### III. MALICE IN LIBEL AND SLANDER.

(4 Barn. & C. 247.)

BROMAGE et al. v. PROSSER (in part).

(Court of King's Bench. Easter Term, 1825.)

#### 1. SLANDER—MALICE.

In an ordinary case of libel or slander (i. e., one which is not a case of privileged communication) the law implies such malice as is necessary to maintain the action, such legal malice being deemed to exist when a wrongful act is done intentionally, without just cause or excuse. It is, therefore, not proper to submit this question of malice in such cases to the jury. But where the defamatory words are published on a privileged occasion, and are therefore *prima facie* excusable, malice in fact must be proved by the plaintiff and found by the jury, in order to sustain the action.

#### 2. SAME.

In an action for slander in saying that plaintiff's bank had stopped, it appeared that in answer to a question whether such was the fact defendant had said it was true; that he was told so; that it was so reported. The judge instructed the jury that if they thought the words were not spoken maliciously the defendant ought to have their verdict. The jury having found a verdict for the defendant, *held*, on a motion for a new trial, that this instruction, leaving the question of malice to the jury, was erroneous.

Motion for a new trial.

Action for slander for words spoken of plaintiffs in their trade and business as bankers. At the trial the jury found a verdict for defendant. A rule nisi for a new trial was obtained by plaintiffs on the ground that the judge at the trial improperly left to the jury the question of malice.

BAYLEY, J. This was an action for slander. The plaintiffs were bankers at Monmouth, and the charge was that, in answer to a question from one Lewis Watkins, whether he, the defendant, had said that the plaintiffs' bank had stopped, the defendant's answer was, "It was true; he had been told so." The evidence was that Watkins met defendant, and said, "I hear that you say the bank of Bromage and Snead, at Monmouth, has stopped. Is it true?" Defendant said, "Yes, it is; I was told so." He added, "It was so reported at Crickhowell, and nobody would take their bills, and that he had come to town in consequence of it himself." Watkins said, "You had better take care what you say; you first brought the news to town, and told Mr. John Thomas of it."

Defendant replied, "I was told so." Defendant had been told at Crickhowell there was a run upon plaintiffs' bank, but not that it had stopped, or that nobody would take their bills, and what he said went greatly beyond what he had heard. The learned judge considered the words as proved, and he does not appear to have treated it as a case of privileged communication; but, as the defendant did not appear to be actuated by any ill will against the plaintiffs, he told the jury that, if they thought the words were not spoken maliciously, though they might unfortunately have produced injury to the plaintiffs, the defendant ought to have their verdict; but if they thought them spoken maliciously, they should find for the plaintiff. The jury having found for the defendant, the question, upon a motion for a new trial, was upon the propriety of this direction.

If, in an ordinary case of slander, (not a case of privileged communication,) want of malice is a question of fact for the consideration of a jury, the direction was right; but if, in such a case, the law implies such malice as is necessary to maintain the action, it is the duty of the judge to withdraw the question of malice from the consideration of the jury; and it appears to us that the direction in this case was wrong. That malice, in some sense, is the gist of the action, and that, therefore, the manner and occasion of speaking the words is admissible in evidence to show they were not spoken with malice, is said to have been agreed (either by all the judges, or, at least, by the four who thought the truth might be given in evidence on the general issue) in *Smith v. Richardson*, Willes, 24; and it is laid down 1 Com. Dig. tit. "Action upon the Case for Defamation," g 5, that the declaration must show a malicious intent in the defendant; and there are some other very useful elementary books in which it is said that malice is the gist of the action; but in what sense the words "malice" or "malicious intent" are here to be understood, whether in the popular sense, or in the sense the law puts upon those expressions, none of these authorities state. "Malice," in common acceptation, means ill will against a person; but in its legal sense it means a wrongful act, done intentionally, without just cause or excuse. If I give a perfect stranger a blow likely to produce death, I do it of malice, because I do it intentionally, and without just cause or excuse. If I maim cattle without knowing whose they are, if I poison a fishery without knowing the owner, I do it of malice, because it is a wrongful act, and done intentionally. If I am arraigned for felony, and willfully stand mute, I am said to do it of malice, because it is intentional, and without just cause or excuse. Russ. Crimes, 614, note 1. And if I traduce a man whether I know him or not, and whether I intend to do him an injury or not, I apprehend the law considers it as done of malice, because it is wrongful and intentional. It equally works an injury whether I meant to produce an injury or not, and, if I had no legal excuse for the slander, why is he not to have a remedy against me for the injury it produces? And I apprehend the law recognizes the distinction

between these two descriptions of malice, malice in fact and malice in law, in actions of slander. In an ordinary action for words, it is sufficient to charge that the defendant spoke them falsely; it is not necessary to state that they were spoken maliciously. This is so laid down in *Style*, 392, and was adjudged upon error in *Mercer v. Sparks*, Noy, 35. The objection there was that the words were not charged to have been spoken maliciously, but the court answered that the words were themselves malicious and slanderous, and therefore the judgment was affirmed. But in actions for such slander as is *prima facie* excusable on account of speaking or writing it, as in the case of servants' characters, confidential advice, or communications to persons who ask it, or have a right to expect it, malice in fact must be proved by the plaintiff; and in *Edmonson v. Stevenson*, Bull. N. P. 8, Lord Mansfield takes a distinction between these and ordinary actions of slander. In *Weathers-ton v. Hawkins*, 1 Term R. 110, where a master, who had given a servant a character which prevented his being hired, gave his brother-in-law, who applied to him upon the subject, a detail by letter of certain instances in which the servant had defrauded him, Wood, who argued for the plaintiff, insisted that this case did not differ from the case of common libels; that it had the two essential ingredients, slander and falsehood; that it was not necessary to prove express malice; if the matter is slanderous, malice is implied, it is sufficient to prove publication; the motives of the party publishing are never gone into, and that the same doctrine held in action for words,—no express malice need be proved. Lord Mansfield said the general rules are laid down as Mr. Wood has stated, but to every libel there may be an implied justification from the occasion; and Buller, J., said this is an exception to the general rule, on account of the occasion of writing. In actions of this kind, the plaintiff must prove the words "malicious" as well as "false." But in an ordinary action for a libel or for words, though evidence of malice may be given to increase the damages, it never is considered as essential, nor is there any instance of a verdict for a defendant on the ground of want of malice. Numberless occasions must have occurred, (particularly in cases where a defendant only repeated what he had heard before, but without naming the author,) upon which, if that were a tenable ground, verdicts would have been sought for and obtained, and the absence of any such instance is a proof of what has been the general and universal opinion upon the point. Had it been noticed to the jury how the defendant came to speak the words, and had it been left to them as a previous question, whether the defendant understood Watkins as asking for information for his own guidance, and that the defendant spoke what he did to Watkins merely by way of honest advice to regulate his conduct, the question of malice in fact would have been proper as a second question to the jury, if their minds were in favor of the defendant upon the first; but as the previous question I have mentioned was never put to the jury, but this was treated as an or-

dinary case of slander, we are of opinion that the question of malice ought not to have been left to the jury. We are therefore of opinion that the rule for a new trial must be absolute.

Rule absolute.

("Malice in law" exists in cases of libel or slander, when there is an *absence of any legal excuse* for the false and defamatory publication. *Holmes v. Jones*, 147 N. Y. 59, 41 N. E. 409, 49 Am. St. Rep. 646; *Krug v. Pitass*, 162 N. Y. 154, 56 N. E. 526, 76 Am. St. Rep. 317; *Barr v. Moore*, 87 Pa. 385, 30 Am. Rep. 367; *Benton v. State*, 59 N. J. Law, 551, 36 Atl. 1041. Such excuse lacking, the words are actionable, although spoken or published accidentally or inadvertently, or with an honest belief in their truth, or from commendable motives, as, e. g., to save a friend from harm. *Id.*; *Byam v. Collins*, 111 N. Y. 143, 19 N. E. 75, 2 L. R. A. 129, 7 Am. St. Rep. 726. When one meditates publishing a defamatory charge, but cannot prove it to be true, and there is no "privileged occasion" for publishing it, "silence is golden.")

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#### IV. PUBLICATION.

(13 Gray, 304, 74 Am. Dec. 632.)

**SHEFFILL et ux. v. VAN DEUSEN et ux.**

(Supreme Judicial Court of Massachusetts. September Term, 1859.)

##### SLANDER—PUBLICATION OF DEFAMATORY WORDS.

No action can be maintained for the speaking of defamatory words to the person of whom they are spoken only, no one else being present or within hearing. That they were spoken in a public place is immaterial.

Exceptions from court of common pleas.

Action of tort by Hiram Sheffill and wife against George J. Van Deusen and wife for slander. The judge before whom the case was tried signed a bill of exceptions, as follows: "The words claimed to have been slanderous were spoken, if at all, at the dwelling-house of the defendants, and in that part thereof called the 'bakery,' where bread and other articles were sold to customers; and were spoken by Mrs. Van Deusen to Mrs. Sheffill. The defendants asked the court to instruct the jury that if the words alleged in the plaintiffs' declaration were spoken to Mrs. Sheffill, and no other person but Mrs. Sheffill and Mrs. Van Deusen were present, there was no such publication of the words as would maintain the action. The court declined so to instruct, but did instruct the jury that, if the words were publicly uttered in the bakery of the defendants, there was a sufficient publication, though the plaintiff has not shown that any other person was present, at the time they were spoken, but Mrs. Sheffill and Mrs. Van Deusen. The jury returned a verdict for the plaintiffs, and the defendants expect."

**BIGELOW, J.** Proof of the publication of the defamatory words alleged in the declaration was essential to the maintenance of this action.

Slander consists in uttering words to the injury of a person's reputation. No such injury is done when the words are uttered only to the person concerning whom they are spoken, no one else being present or within hearing. It is damage done to character in the opinion of other men, and not in a party's self-estimation, which constitutes the material element in an action for verbal slander. Even in a civil action for libel, evidence that the defendant wrote and sent a sealed letter to the plaintiff, containing defamatory matter, was held insufficient proof of publication; although it would be otherwise in an indictment for libel, because such writings tend directly to a breach of the peace. So, too, it must be shown that the words were spoken in the presence of some one who understood them. If spoken in a foreign language, which no one present understood, no action will lie therefor. *Edwards v. Wooton*, 12 Coke, 35; *Hickes' Case*, Poph. 139, and Hob. 215; *Wheeler and Appleton's Case*, Godb. 340; *Phillips v. Jansen*, 2 Esp. 624; *Lyle v. Clason*, 1 Caines, 581; *Ham. N. P.* 287. It is quite immaterial, in the present case, that the words were spoken in a public place. The real question for the jury was, were they so spoken as to have been heard by a third person? The defendants were therefore entitled to the instructions for which they asked.

Exceptions sustained.

(See *Schmuck v. Hill* [Neb.] 96 N. W. 158; *Spalts v. Poundstone*, 87 Ind. 522, 44 Am. Rep. 773; *Seip v. Deshler*, 170 Pa. 334, 32 Atl. 1032; *Haase v. State*, 53 N. J. Law, 34, 20 Atl. 751. It is a sufficient publication of a *criminal libel* to send it to the man himself who is defamed. *Warnock v. Mitchell* [C. C.] 43 Fed. 428.)

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([1891] 1 Q. B. 524.)

**PULLMAN et al. v. WALTER HILL & CO., Limited.**

(Court of Appeal. December 19, 1890.)

#### **LIBEL—PUBLICATION.**

In an action for libel it appeared that the alleged libel was contained in a letter respecting plaintiffs, two of the members of a partnership, written on behalf of defendants, a limited company, by their managing director, and sent by mail in an envelope addressed to the firm; the writer not knowing that there were other partners in the firm. The letter was dictated by him to a clerk, who took down the words in short-hand and then wrote them out in full by means of a type-writing machine; and the letter thus written was copied by an office-boy in a copying-press. When it reached its destination, it was opened by a clerk of the firm, in the ordinary course of business, and was read by two other clerks of the firm. *Held*, that there was a publication of the letter, both to defendants' clerks and to plaintiffs' clerks, and that neither was on a privileged occasion.

Motion for new trial.

Action for libel. At the trial it appeared that plaintiffs were members of a partnership firm of R. & J. Pullman, in which there were three other

partners. The place of business of the firm was No. 17 Greek street, Soho. The plaintiffs were the owners of some property in the Borough road, which they had contracted, in 1887, to sell to Messrs. Day & Martin. The plaintiffs remained in possession of the property for some time, and agreed to let a hoarding, which was erected upon the property, at a rent to the defendants, who were advertising agents, for the display of advertisements. In 1889 a dispute arose between the plaintiffs and Day & Martin, who were building upon the land, as to which of the two were entitled to the rent of the hoarding; and on September 14, 1889, the defendants, after some prior correspondence, wrote the following letter: "Messrs. Pullman & Co., 17 Greek St., Soho. Re Boro' Road. Dear Sirs: We must call your serious attention to this matter. The builders state distinctly that you had no right to this money whatever; consequently it has been obtained from us under false pretenses. We await your reply by return of post. Yours, faithfully, [Signed] Walter Hill & Co., Limited." This letter was dictated by the defendants' managing director to a short-hand clerk, who transcribed it by a type-writing machine. The type-written letter was then signed by the managing director, and, having been press-copied by an office-boy, was sent by post in an envelope addressed to "Messrs. Pullman & Co., 17 Greek street, Soho." The defendants did not know that there were any other partners in the firm besides the plaintiffs. The letter was opened by a clerk of the firm, in the ordinary course of business, and was read by two other clerks. The plaintiffs brought this action for libel. The defendants contended that there was no publication, and that, if there were, the occasion was privileged. The learned judge held that there was no publication, that the occasion was privileged, and that there was no evidence of malice. He therefore nonsuited the plaintiffs, and they moved for a new trial.

ESHER, M. R. Two points were decided by the learned judge: (1) That there had been no publication of the letter which is alleged to be a libel; (2) that, if there had been publication, the occasion was privileged. The question whether the letter is or is not a libel is for the jury, if it is capable of being considered an imputation on the character of the plaintiffs. If there is a new trial, it will be open to the jury to consider whether there is a libel, and what the damages are. The learned judge withdrew the case from the jury.

The first question is whether, assuming the letter to contain defamatory matter, there has been a publication of it. What is the meaning of "publication?" The making known the defamatory matter after it has been written to some person other than the person to whom it is written. If the statement is sent straight to the person of whom it is written, there is no publication of it; for you cannot publish a libel of a man to himself. If there were no publication, the question whether the occasion was privileged does not arise. If a letter is not communicated to any

one but the person to whom it is written, there is no publication of it. And if the writer of a letter locks it up in his own desk, and a thief comes and breaks open the desk and takes away the letter, I should say that would not be a publication. If the writer of a letter shows it to his own clerk in order that the clerk may copy it for him, is that a publication of the letter? Certainly it is showing it to a third person. The writer cannot say, to the person to whom the letter is addressed, "I have shown it to you, and to no one else." I cannot, therefore, feel any doubt that, if the writer of a letter shows it to any person other than the person to whom it is written, he publishes it. If he wishes not to publish it, he must, so far as he possibly can, keep it to himself, or he must send it himself straight to the person to whom it is written. There was therefore in this case a publication to the type-writer.

Then arises the question of privilege, and that is whether the occasion on which the letter was published was a privileged occasion. An occasion is privileged when the person who makes the communication has a moral duty to make it to the person to whom he does make it, and the person who receives it has an interest in hearing it. Both these conditions must exist in order that the occasion may be privileged. An ordinary instance of a privileged occasion is in the giving the character of a servant. It is not the legal duty of the master to give a character to the servant, but it is his moral duty to do so; and the person who receives the character has an interest in having it. Therefore the occasion is privileged, because the one person has a duty and the other has an interest. The privilege exists as against the person who is libeled; it is not a question of privilege, as between the person who makes and the person who receives the communication. The privilege is as against the person who is libeled. Can the communication of the libel by the defendants in the present case to the type-writer be brought within the rule of privilege as against the plaintiffs, the persons libeled? What interest had the type-writer in hearing or seeing the communication? Clearly, she had none. Therefore the case does not fall within the rule.

Then, again, as to the publication at the other end,—I mean when the letter was delivered. The letter was not directed to the plaintiffs in their individual capacity; it was directed to a firm of which they were members. The senders of the letter no doubt believed that it would go to the plaintiffs, but it was directed to a firm. When the letter arrived it was opened by a clerk in the employment of the plaintiffs' firm, and was seen by three of the clerks in their office. If the letter had been directed to the plaintiffs in their private capacity, in all probability it would not have been opened by a clerk. But mercantile firms, and large tradesmen generally, depute some clerk to open business letters addressed to them. The sender of the letter had put it out of his own control, and he had directed it in such a manner that it might possibly be opened by a clerk of the firm to which it was addressed. I agree

that, under such circumstances, there was a publication of the letter by the sender of it, and in this case, also, the occasion was not privileged, for the same reasons as in the former case. There were therefore two publications of the letter, and neither of them was privileged. And there being no privilege, no evidence of express malice was required; the publication of itself implied malice. I think the learned judge was misled. I do not think that the necessities or the luxuries of business can alter the law of England. If a merchant wishes to write a letter containing defamatory matter, and to keep a copy of the letter, he had better make the copy himself. If a company have deputed a person to write a letter containing libelous matter on their behalf, they will be liable for his acts. He ought to write such a letter himself, and to copy it himself, and, if he copies it into a book, he ought to keep the book in his own custody.

I think there ought to be a new trial.

LOPES, L. J., and KAY, L. J., concurred.

Order for new trial.

(This decision has been followed in this country in the case of *Gambrill v. Schooley*, 93 Md. 48, 48 Atl. 730, 52 L. R. A. 87, 86 Am. St. Rep. 414, and the cases of *Boxsius v. Goblet Frères* [1894] 1 Q. B. 843, and *Owen v. Ogilvie Pub. Co.*, 32 App. Div. 465, 53 N. Y. Supp. 1033, which are seemingly inconsistent, are distinguished. The doctrine is also asserted in *Sun Life Assur. Co. v. Bailey* [Va.] 44 S. E. 692. In *Williamson v. Freer*, L. R. 9 C. P. 393, the sending of a telegram containing libelous matter was held a publication, as being a disclosure to the clerks in the telegraph offices [*S. P. Monson v. Lathrop*, 96 Wis. 386, 71 N. W. 596, 65 Am. St. Rep. 54; cf. *Peterson v. Western Union Tel. Co.*, 72 Minn. 41, 74 N. W. 1022, 40 L. R. A. 661, 71 Am. St. Rep. 461]; so as to the sending through the mails of a postal card, unless its contents were so expressed that those through whose hands it passed would not understand its application [*Sadgrove v. Hole* (1901) 2 K. B. 1; *Robinson v. Jones*, 4 L. R. Ir. 391; contra, *Steele v. Edwards*, 15 Ohio Cir. Ct. R. 52]; so a person has been held liable for sending through the mails letters having libelous matter printed upon the face of the envelopes [*Muetze v. Tuteur*, 77 Wis. 236, 46 N. W. 123, 9 L. R. A. 86, 20 Am. St. Rep. 115]. A vendor of a newspaper containing a libel was held not to have published the libel upon his proving that he did not know the paper contained a libel, that his ignorance was not due to any negligence on his part, and that he did not know, and had no ground for supposing, that the newspaper was likely to contain libelous matter [*Emmens v. Pottle*, 16 Q. B. D. 354]; but the proprietors of a circulating library, who failed to prove similar freedom from negligence on their part, were held liable for circulating copies of a book containing libelous matter, though they did not know the book had such contents [*Vizetelly v. Mudie's Library* (1900) 2 Q. B. 170.]

A statement by a husband to his wife of a defamatory accusation against a third person is not deemed a publication, *Wennbak v. Morgan*, 20 Q. B. D. 635. For the general rule as to what constitutes a publication, see *Marble v. Chapin*, 132 Mass. 225; *Youmans v. Smith*, 153 N. Y. 214, 47 N. E. 265; *Bacon v. Railroad Co.*, 55 Mich. 224, 21 N. W. 324, 54 Am. Rep. 372; *Young v. Clegg*, 93 Ind. 371; *Mielenz v. Quasdorf*, 68 Iowa, 726, 28 N. W. 41; *Sproul v. Pillsbury*, 72 Me. 20.)

## V. DEFENSE OF "JUSTIFICATION."

(19 Kan. 417, 27 Am. Rep. 127.)

CASTLE v. HOUSTON (in part).

(Supreme Court of Kansas. July Term, 1877.)

### 1. LIBEL—JUSTIFICATION.

In civil actions for libel, proof of the truth of the matter charged as defamatory is a complete justification, without showing that it was published with good motives and for justifiable ends.

### 2. SAME—CONSTITUTIONAL PROVISION.

The constitution of Kansas provides (Bill of Rights, § 11) that, "in all civil or criminal actions for libel, the truth may be given in evidence to the jury, and, if it shall appear that the alleged libelous matter was published for justifiable ends, the accused shall be acquitted." *Held*, in construction of this provision, in view of the former rule of law, that proof of the truth of the matter charged as defamatory was a complete justification in a civil action for libel; and that proof that the matter was published for justifiable ends in order that "the accused party shall be acquitted," was limited to criminal prosecutions.

Error from District Court, Leavenworth County.

Action for libel. A verdict for plaintiff, on trial in the district court, was set aside by that court on motion, and a new trial granted. From the order granting the new trial plaintiff appealed, and brought the case to the supreme court on error.

HORTON, C. J. This was an action commenced in the district court of Leavenworth county to recover damages for libel. The petition alleges, in substance, that the defendant was editor, proprietor, and publisher of the Leavenworth Daily Commercial, a newspaper printed in the city of Leavenworth, and that on the 20th of January, 1875, there was published in said paper, of and concerning the plaintiff, a certain false and malicious libel, in words as follows, to-wit: "The insurance department of our state will in all probability be subject to a thorough investigation, as a bill has already been introduced into the senate to investigate. This is right. Every insurance company in the state is willing an investigation be had. Mr. Russell, ex-superintendent, invites it, and the present superintendent is anxious for the same. There is a cadaverous looking individual of Leavenworth loafing around here who seems exceedingly anxious for an investigation, in hopes that the superintendent will be done away with, and the department presided over by the auditor. A clerkship in the dim distance makes him en-thuse. I cannot blame Castle much, knowing that board and other bills too numerous to mention have been pressing him for some time, and then, doubtless, the Northwestern Life would be glad to hear from him, as he was published as a defaulter to that company. He is one of the most promising individuals (to his landlords) I know of, and

the cry of fraud from such a completely played-out insurance agent has but little bearing with an intelligent body of legislators. If his caliber was as large as his bore, he would be a success. Jack."

In answer to the petition, defendant set up three defenses: First, an admission that the article complained of was published in defendant's paper of and concerning the plaintiff, but denied that the same was published with malice; second, that defendant had no personal knowledge of the publication of the article at the time of its publication, with the further allegation that the several matters and things in the article complained of as defamatory were true, and published for justifiable ends and purposes; and, third, a general denial. To the answer plaintiff filed a reply, denying generally, save and except what was admitted, all the allegations in the answer. When the case came on for trial, it was submitted to a jury, and plaintiff obtained a verdict of \$1,250; whereupon defendant gave notice of motion for a new trial, which was filed, and, after being argued, was by the court sustained, upon the ground that the court had erred in its instructions to the jury. The plaintiff excepted, and has brought the case here for review.

It appears from the record that the court below granted the motion for a new trial on the ground that the jury was misdirected by the following instructions, viz.: "The fact of the language being true is not alone an answer to the charge, but can only be shown in mitigation of damages. It is not a defense simply to show the truth of the matter published, but the party must go further, and show that it was not only true, but that he acted from good motives and for a justifiable end, and that he had some purpose in view that was justifiable. If that be the case, if he acts honestly, for good purposes and justifiable ends, and what he says is true, then he is to be excused or acquitted."

In this condition of the case, we must first inquire whether the instructions above set forth were improperly given on the trial. If erroneous as a statement of the law controlling the case, they certainly may have misled the jury. If correct in principle, and applicable under the issues presented, the court erred in granting a new trial, for the reason given. An examination of this question will lead to a brief review of the law of libel in both criminal and civil prosecutions, so far as to consider and determine when a defendant may be permitted to give the truth in evidence as a full justification of alleged libelous matter. It was at one time the rule of the common law that the truth of the charge, however honorable and praiseworthy the motives of the publisher, could not be given in evidence in a criminal prosecution. Hence originated the familiar maxim, "The greater the truth, the greater the libel." This doctrine was based upon the theory that, where it was honestly believed a particular person had committed a crime, it was the duty of him who so believed or so knew to cause the offender to be prosecuted and brought to justice, as in a settled state of government a party aggrieved ought to complain for an injury to

the settled course of law; and to neglect this duty, and publish the offense to the world, thereby bringing the party published into disgrace or ridicule without an opportunity to show by the judgment of a court that he was innocent, was libelous; and, if the matter charged was in fact true (thereby insuring social ostracism), the injury caused by the publication was much greater than where the publication was false. A false publication, it was contended, could be explained and exposed; a true one was difficult to explain away. As an additional reason for this rule, it was also held that such publications, even if true, were provocative of breaches of the peace, and the greater the truth contained therein the greater the liability of hostile meetings therefrom. That this was the true rule of the common law has been denied by many of the ablest jurists in both England and America, who maintained that the liberty of the press consisted in the right to publish, with impunity, truth with good motives and for justifiable ends, whether it respected government, magistracy, or individuals. It certainly was derived from the polluted source of the star chamber, and was considered at the time an innovation, but, like some other precedents, although arbitrarily and unjustly established, it came to be followed generally by the courts, and sustained as the law of the land. In 1804, in the state of New York, this principle of law was recognized and asserted in the case of *People v. Crosswell*. In that case the defendant was prosecuted for libel for having published in his newspaper at Hudson, in that state, called the "Wasp," the charge against Thomas Jefferson, then president, that he (Jefferson) paid Callender for calling Washington a traitor, a robber, and a perjurer. The defendant, through his counsel, Alexander Hamilton, applied to the judge at the circuit to put off the trial to obtain the testimony of Callender to prove the publication true. Lewis, C. J., presiding, denied the motion, because the testimony was inadmissible, as the truth of the facts charged as libelous did not amount to a complete justification. 3 Johns. Cas. 337. This case attracted so much attention that, after a verdict of guilty had been rendered, and while the case was in the courts of New York on a motion for a new trial, the legislature of that state passed a law providing that, in every prosecution for writing or publishing any libel, it should be lawful for the defendant upon the trial to give in evidence, in his defense, the truth of the matter contained in the publication charged as libelous, and that such evidence should not be a justification, unless it should be further made satisfactorily to appear that the matter charged as libelous was published with good motives and for justifiable ends. Since the adoption of the New York statute declaratory of the law of libel in criminal actions, nearly every state in the Union has made the subject a matter of constitutional or statutory provision. The wise framers of our own constitution, peculiarly acquainted with the beneficial influences of free discussion and a free press, as participants in the historical incidents and conflicts surround-

ing the settlement of the territory of Kansas, modified the tyrannical and harsh rule of the common law as stated in the star chamber of England, and thereafter generally understood and interpreted, by providing, in section 11 of our bill of rights, that "the liberty of the press shall be inviolate, and all persons may freely speak, write, or publish their sentiments on all subjects, being responsible for the abuse of such right; and, in all civil or criminal actions for libel, the truth may be given in evidence to the jury, and, if it shall appear that the alleged libelous matter was published for justifiable ends, the accused party shall be acquitted." Nevertheless these framers, in a spirit of wisdom, and to preserve order, were careful not to give, as against the interests of the public, complete license even to the truth, when published for the gratification of the worst of passions, or to affect the peace and happiness of society. They prescribe that the accused should be acquitted, not on proof of the truth of the charge alone, but it should further appear the publication was made for justifiable ends. Following the intendment of the constitution, the legislature afterwards provided, in the act relating to crimes and punishments, that, "in all prosecutions or indictments for libel, the truth thereof may be given in evidence to the jury; and if it appears to them that the matter charged as libelous was true, and was published with good motives and for justifiable ends, the defendant shall be acquitted." Section 272, Gen. St. p. 376.

But the law-makers, jealous of the liberty of the press, and fearing the construction of the law by the courts in such prosecution, further provided, in a succeeding section of the same act, that, "in all indictments or prosecutions for libel, the jury, after having received the direction of the court, shall have the right to determine, at their discretion, the law and the fact." Section 275, Gen. St. p. 377.

While the rule of the common law, as generally applied, was so exacting and rigorous to the defense of justification in criminal prosecutions for libel, a different doctrine was applicable in civil cases. In the case of *King v. Root*, 4 Wend. 114, 139, 21 Am. Dec. 102, Chancellor Walworth clearly states this difference as follows: "The difficulty which existed in England, previous to Mr. Fox's libel act, was that in criminal prosecutions the defendant was not permitted to give the truth in evidence; and yet the jury were required to imply malice. But in civil cases the defendant was permitted to give the truth in evidence as a full justification." Such was declared to be the law by the judges at the time that bill was under discussion in parliament, and there has never been any alteration of the law in England on this subject in civil suits. The case of *King v. Root*, *supra*, was originally tried at one of the circuits in New York before Hon. Samuel R. Betts. The defendants, King and Verplanck, were editors of the *New York American*, printed in the city of New York in 1824. These editors published concerning one Root, lieutenant governor of that state,

among other things, that in August of that year he addressed the state senate, then in session, "while blind with passion and rum, when he was unwashed, unshaven, haggard, with tobacco juice trickling from the corners of his mouth, and in a condition outraging all order, decency, and forbearance." Root brought a civil action to recover damages for the alleged libel, and the defendants admitted the publication, and pleaded the truth as justification. The trial judge instructed the jury, "if the defendants had only published the truth, they had an unquestionable right to do that, and they must be acquitted."

Blackstone, in his Commentaries, asserts that the truth could always be given in civil cases in justification of libel, and seems to consider the defendant's exemption in such instances as extended to him in consideration of his merit in having warned the public against the evil practices of a delinquent. He says that it is a *damnum absque injuria*, intimating that the acts of the defendant who justifies a libelous publication does not constitute a wrong, in its legal sense, and then proceeds to observe that this is agreeable to the reasoning of the civil law. 3 Bl. Comm. 125. This is illogical; and Starkie bases this exemption on the better reason that, in such instances, the plaintiff has excluded himself from his right of action at law by his own misconduct, and not to any merit appertaining to the defendant. When a plaintiff is really guilty of the offense imputed, he does not offer himself to the court as a blameless party, seeking a remedy for a malicious mischief. His original misbehavior taints the whole transaction with which it is connected, and precludes him from recovering that compensation to which all innocent persons would be entitled. *Folk. Starkie, Sland. & L. (Amér. Ed.)* § 692.

If it be contended that, within the provision of the constitution, the proof of the truth as a defense in a civil action is no justification, except it be also made to appear that the publication was had for justifiable ends, we answer that, in view of the rule of law applicable in such cases at the time of the adoption of the state constitution, we do not think such a construction proper. It is not in accordance with the spirit or the letter of that instrument. It provides that in civil and criminal actions the truth may be given in evidence to the jury, and, where an accused is on trial,—that is, where a person charged with a crime for the publication of alleged libelous matter is being tried,—he is not to be acquitted, except the publication is true, and the same was published for justifiable ends. In that event only is the accused party entitled to an acquittal. The word "accused" is used in the constitution, and, an "accused" being one who is charged with a crime or misdemeanor, it cannot well be said to apply to a defendant in a civil action. If the motive of the party publishing the truth is to be considered in civil suits, under the constitution, then this section quoted, instead of operating to the protection of individuals charged in personal actions for damages for the publication of alleged libelous

matter, as was doubtless intended by the framers of the constitution, would have the effect to hold parties responsible in cases where at the common law they would be entitled to a verdict. The constitution contains no grant of powers to the legislature. It is only a limitation on the exercise of its authority; and the legislature, in its discretion, has the right to pass any act not violative of the state or federal constitutions. The object of section 11 of the bill of rights was to prevent the passage of any law in Kansas restraining or abridging the liberty of speech and of the press. By it the harsh rule of the common law, as generally recognized in libel prosecutions, was greatly modified; but we cannot seriously think that it was intended thereby to abrogate that principle of the common law, sustained and upheld under the exacting and arbitrary construction of libels in England, that proof of the truth is a complete justification in all civil actions. Nor can we believe that thereby it was intended that the legislative power of the state was forever deprived of conferring the right upon a defendant in a civil action of libel to plead the truth of the words charged as a full and complete defense. To assert otherwise would be to assert that the constitution abridged and curtailed the liberty of the press in civil actions more than the common law,—more than the provisions of the constitutions of other states. The modification of the common law by the constitution we construe in favor of the liberty of the press, not against it. The constitution of Rhode Island provides, "in all trials for libel, both civil and criminal, the truth, unless published from malicious motives, shall be sufficient defense to the person charged." And it was held in that state that the truth of the charge is a good defense in a civil action for libel. *Perry v. Man*, 1 R. I. 263.

From our review of the authorities, the provision of our constitution, the Civil and Criminal Codes, we deduce these important principles: First. In all criminal prosecutions the truth of the libel is no defense unless it was for public benefit that the matters charged should be published; or, in other words, that the alleged libelous matter was true in fact, and was published for justifiable ends; but in all such proceedings the jury have the right to determine, at their discretion, the law and the fact. Second. In all civil actions of libel brought by the party claiming to have been defamed, where the defendant alleges and establishes the truth of the matter charged as defamatory, such defendant is justified in law, and exempt from all civil responsibility. In such actions the jury must receive and accept the direction of the court as to the law. Under this view, the court below misdirected the jury in a very material point, and properly, on attention being again called to the matter by a motion for a new trial, granted such motion, and set the case again for hearing. The instructions given might have been applicable in a criminal proceeding, where the motive of the publication is important, and where the jury have a right to determine the law as well as the fact; but were errone-

ous in a civil action, where the facts charged were proven in justification. The instructions assumed that the truth is not a full and complete defense unless it was shown to have been published for good purposes and justifiable ends. This is not correct. If the charges made by the defendant are true, however malicious, no action lies. *Root v. King*, 7 Cow. 613, 632; *Townsh. Sland. & L.* § 211; *Foss v. Hildreth*, 10 Allen, 76; *Baum v. Clause*, 5 Hill, 196; 1 *Starkie, Sland. & L.* 229; *Rayne v. Taylor*, 14 La. Ann. 406.

The order of the district court setting aside the verdict of the jury in the case, and granting a new trial, is affirmed.

All concurred.

(In a number of the states it is now the law that in criminal cases of libel the truth is a sufficient defense if proved to have been published "with good motives and for justifiable ends." *N. Y. Pen. Code*, § 244; *Drake v. State*, 53 *N. J. Law*, 23, 20 *Atl.* 747; *State v. Hoskins*, 109 *Iowa*, 656, 80 *N. W.* 1063, 47 *L. R. A.* 223, 77 *Am. St. Rep.* 560; *State v. Wait*, 44 *Kan.* 310, 24 *Pac.* 354; *State v. Shippman*, 83 *Minn.* 441, 86 *N. W.* 431; cf. *Perry v. Porter*, 124 *Mass.* 338. But in civil actions for libel or slander the truth is at common law a complete defense, no matter what may have been the motive for its publication. In some states, however, the above rule as to criminal libels is by statutory or constitutional provisions made applicable to civil libels also. *Jones v. Townsend's Adm'x*, 21 *Fla.* 431, 58 *Am. Rep.* 476; *Delaware Ins. Co. v. Croasdale*, 6 *Houst. [Del.]* 181; *Sweeney v. Baker*, 13 *W. Va.* 158, 31 *Am. Rep.* 757; *Pokrok Pub. Co. v. Ziskovsky*, 42 *Neb.* 64, 60 *N. W.* 358.)

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(113 *Mich.* 199, 71 *N. W.* 585.)

YOUNGS v. ADAMS (in part).

(Supreme Court of Michigan. May 28, 1897.)

**JUSTIFICATION**—IDENTICAL CHARGE MADE MUST BE PROVED.

A charge of being a thief cannot be justified by showing that the person so accused was guilty of cheating, fraud, or false pretenses.

Error to Circuit Court, Marquette County; John W. Stone, Judge. Action by Clark W. Youngs against Sidney Adams. Judgment for plaintiff. Defendant brings error. Affirmed.

HOOKER, J. The defendant appeals from a verdict and judgment against him in a slander case. The slanderous words charged were: "You are a liar and thief, and I have the papers to prove it." The court instructed the jury that these words, taken in their ordinary and natural sense, charged the plaintiff with the offense of larceny, and the statement, if made without qualification, was actionable per se. With the plea of the general issue, the defendant filed a notice, in the nature of justification, in which he alleged that he would prove that the plaintiff, while in his employ, defrauded him in various ways, and fraudulently embezzled and converted to his own use the moneys of

the defendant, and obtained the property of others named by false pretenses.

The court instructed the jury that proof of cheating, trickery, and fraud, unless it amounted to actual theft, would not amount to a justification, and that no taking or conversion would amount to larceny or embezzlement—which he said was statutory larceny—unless it included a felonious intent to convert the property taken or misappropriated to his own use. It was thus left to the jury to find a justification by embezzlement, if the necessary elements to establish it were found. We think the court did not err in saying that a charge of being a thief could not be justified by showing the plaintiff guilty of cheating, fraud, or false pretenses, and there was no error in refusing the numerous requests upon these subjects. The other justices concurred.

(Saying that a person has stolen a certain article is not justified by showing that he stole a different article [*Hilsden v. Mercer*, Cro. Jac. 677; *Ridley v. Perry*, 16 Me. 21]; a charge of stealing a dollar from one person, by proof of stealing it from another person [*Gardner v. Self*, 15 Mo. 480]; a charge of one kind of misconduct, by proof of a different kind [*Shepard v. Merrill*, 13 Johns. 475]; a charge of one crime, by proving another or a different crime [*Skinner ads. Powers*, 1 Wend. 451; *Coffin v. Brown*, 94 Md. 190, 50 Atl. 567, 55 L. R. A. 732, 89 Am. St. Rep. 422; *Haddock v. Naughton*, 74 Hun, 390, 26 N. Y. Supp. 455]. To the same effect are *Pallet v. Sargent*, 36 N. H. 496; *Burford v. Wible*, 32 Pa. 95; *Downs v. Hawley*, 112 Mass. 237; *State v. Verry*, 36 Kan. 416, 13 Pac. 838; *Watters v. Smoot*, 33 N. C. 315.)

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(19 Wend. 487.)

**STILWELL v. BARTER** (in part).

(Supreme Court of New York. May, 1838.)

**JUSTIFICATION MUST BE AS BROAD AS THE CHARGE.**

A charge of smuggling goods into the country is libelous. It is no answer to a libel charging a party with having been actively and profitably engaged in smuggling during the period of the late war, that he had violated the revenue laws in a single instance previous to the war and in a time of peace; the justification, to be efficient, must be as broad as the libel.

Demurrer to plea. Action for a libel on the plaintiff, who, at and before the time of publication, was deputy collector of the port of Ogdensburgh, and inspector of the customs for the district of Oswegatchie.

**BRONSON, J.** On the most favorable construction that can be given to the libel, it charges the plaintiff with having been engaged in smuggling goods into the country from Canada during the period of the late war; that he was so engaged, not in a single instance only, but as a business or pursuit. The language is, "He has been actively

and profitably engaged in a particular kind of dry goods business," and thus acquired an "intimate knowledge of the old smuggling haunts and by-paths." It is also charged, in effect, that the plaintiff received his appointment to office on account of the intimate knowledge which he had acquired in that business of the old smuggling haunts and by-paths.

The plea contains no answer whatever to the charge that the plaintiff was engaged in smuggling during the period of the late war. It only alleges a single violation of the laws of the United States in February, 1812—several months before war was declared. There are several shades of difference between a mere transgression of the revenue laws of the country in time of peace, and an illicit intercourse with the public enemy in time of war; and the defendant must justify the charge which he has made. It is not enough to show that the plaintiff has been guilty of some improper conduct, other than that which is imputed to him. *Andrews v. Vanduzer*, 11 Johns. R. 38. *Skinner ads. Powers*, 1 Wendell, 451.

The plea contains no answer to the charge that the plaintiff received his appointment to office on account of his intimate knowledge, acquired by smuggling, of the old smuggling haunts and by-paths. It professes to answer the whole libel, and is clearly bad for only answering a part.

Judgment for the plaintiff.

(In *Fero v. Ruscoe*, 4 N. Y. 162, 165, the following apt statement is made: "The justification must be as broad as the charge. There is no such thing as a halfway justification. When several distinct things are charged, the defendant may justify as to one, though he may not be able to do so as to all; but as to any one charge, the justification will either be everything or nothing. If the charge be of stealing a horse, it is not half of a defense, nor any part of one, to show that the plaintiff took the horse by a mere trespass; or if the charge be perjury, proof that the plaintiff swore falsely through an innocent mistake amounts to nothing." To the same effect are *O'Brien v. Bryant*, 16 M. & W. 168; *Wakley v. Healey*, 4 Exch. 511; *Christianson v. O'Neil*, 39 Misc. Rep. 11. 78 N. Y. Supp. 757, affirmed 82 App. Div. 636, 81 N. Y. Supp. 1120; *Stock v. Keele*, 86 App. Div. 136, 83 N. Y. Supp. 133; *Rutherford v. Paddock*, 180 Mass. 289, 62 N. E. 381, 91 Am. St. Rep. 282; *Chapman v. Ordway*, 5 Allen, 593; 18 Amer. & Eng. Encyc. of Law [2d Ed.] 1070. A justification is not made out by proving that there are rumors that the charge is true. *Stuart v. News Pub. Co.*, 67 N. J. Law, 317, 51 Atl. 709; *Brewer v. Chase*, 121 Mich. 526, 80 N. W. 575, 46 L. R. A. 397, 80 Am. St. Rep. 527. It is sufficient, however, to prove that the charge made is substantially true. *Conner v. Standard Pub. Co.*, 183 Mass. 474, 67 N. E. 596; *McLeod v. Crosby*, 128 Mich. 641, 87 N. W. 883. When several separate and distinct things are charged, the defendant may justify as to one, though he fail as to the others. *Lanpher v. Clark*, 149 N. Y. 472, 44 N. E. 182; *Clarkson v. Lawson*, 6 Bing. 587.

By statute in a number of the states, matter which, if pleaded as a justification, will not suffice for this purpose, may be proved in mitigation of damages. In some of these states, however, this is only allowable in case these facts are specially pleaded by way of mitigation, in addition to the plea of justification. *Klinck v. Colby*, 46 N. Y. 427, 7 Am. Rep. 360; *Hathorn v. Congress Spring Co.*,

44 Hun, 608; *Times Pub. Co. v. Carlisle*, 94 Fed. 762, 36 C. C. A. 475; *Marker v. Dunn*, 68 Iowa, 720, 28 N. W. 38; *Wilson v. Noonan*, 35 Wis. 321. The common-law rule is otherwise, not allowing matter which tends to prove the truth of the charge complained of to be received in evidence by way of mitigation. *Bisbey v. Shaw*, 12 N. Y. 67.

If the defamatory charge is prefaced with such words as these, "It is reported that," etc., or "There is a rumor," etc., or "A has said that," etc., it will not be a justification to prove that there was such a report or rumor, or that A did make the statement, but the truth of the charge itself must be established. *Brewer v. Chase*, 121 Mich. 526, 80 N. W. 575, 46 L. R. A. 397, 80 Am. St. Rep. 527; *Watkin v. Hall*, L. R. 3 Q. B. 396; *Kenney v. McLaughlin*, 5 Gray, 3, 66 Am. Dec. 345.

It is now the general rule in this country [though in a few states it is otherwise] that the defense of justification, when it alleges the commission of a crime, may be established by a preponderance of evidence, and that proof beyond a reasonable doubt is not required. *Ellis v. Buzzell*, 60 Me. 209, 11 Am. Rep. 204; *Lewis v. Shull*, 67 Hun, 543, 22 N. Y. Supp. 484; *McBee v. Fulton*, 47 Md. 403, 28 Am. Rep. 465; *Bell v. McGuinness*, 40 Ohio St. 204, 48 Am. Rep. 673; *Peoples v. Evening News*, 51 Mich. 11, 16 N. W. 185, 691.)

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## VI. DEFENSE OF "PRIVILEGED COMMUNICATION."

### 1. Qualified privilege.

(73 Md. 87, 20 Atl. 774, 10 L. R. A. 67, 25 Am. St. Rep. 575.)

*FRESH v. CUTTER* (in part).

(Court of Appeals of Maryland. November 13, 1890.)

#### 1. SLANDER—PRIVILEGED COMMUNICATIONS—CHARACTER OF SERVANT.

Where the former master of one who is about to enter the service of another, voluntarily, in good faith, without malice, in the honest belief that he is discharging a duty to his neighbor, and with a full conviction of the truth of his words, tells the new master that the servant has stolen from him, the communication is privileged.

#### 2. SAME.

Damages cannot be recovered by the servant in such a case, in an action against the former master for slander, unless the plaintiff shows that actual malice prompted the utterance.

#### 3. SAME.

The speaking of such words to a person other than the new master would not be privileged, though made with a belief in their truth.

Appeal from Circuit Court, Washington County.

The pleas herein successfully demurred to were as follows: "And the defendant, for a second plea, says that he honestly and bona fide believed the words spoken by him were true, and that he spoke them to a neighbor who had employed the plaintiff, or was about to employ him, and that he spoke the words to said neighbor in the bona fide performance of a duty, and without malice; and for a third plea the

defendant says that, when he spoke the alleged slanderous words set forth in the declaration, he honestly and bona fide believed them to be true, and that he spoke them only to a neighbor, Mr. Charles Allen, who had employed, or was about to employ, the plaintiff, and that he spoke the said words to said neighbor in the bona fide performance of a duty, and without malice."

Argued before ALVEY, C. J., and BRYAN, MILLER, IRVING, FOWLER, BRISCOE, and McSHERRY, JJ.

McSHERRY, J. Jacob Cutter sued George H. Fresh for defamatory words alleged to have been spoken by the latter of and concerning the former. Cutter had at one time been an employee of Fresh, but after he ceased to occupy that relation, and had entered, or was about to enter, the service of one Allen, Fresh, of his own accord, and without solicitation or inquiry on the part of Allen, said to Allen, "He [meaning the plaintiff] stole as good as two hundred dollars from me, and I want the money." These are the alleged defamatory words. It was shown by the evidence that several persons had communicated information to Fresh which induced him to believe that Cutter had while in his employment stolen from him. It was also shown that when he learned that his neighbor Allen had employed Cutter, he, Fresh, honestly believed that it was his duty to inform Allen of what he knew concerning Cutter; and that he told Allen these things voluntarily, and without being requested, honestly believing it was a duty he owed to his neighbor, and for the sole purpose of putting Allen upon his guard. He testified that he had not been actuated by malice or ill will, and that he had never had any bad feeling against Cutter. There was some evidence that the words complained of had been spoken by Fresh to a person named Click, though the latter was unable to state whether the language used by the defendant was "took" or "stole."

This brief outline of the facts is sufficient to indicate that the principal question which we are called upon to decide on this appeal is whether the statement made by Fresh to Allen, under the circumstances named, was a privileged communication or not. If privileged, all the authorities agree in holding that it is not absolutely or unqualifiedly, but only conditionally, so. If falsely and maliciously made, it would be actionable. Malice is the foundation of the action, and in ordinary cases is implied from the slander; but there may be justification from the occasion, and when this appears, an exception to the general rule arises, and the words must be proved to be malicious as well as false. *Beeler v. Jackson*, 64 Md. 593, 2 Atl. 916. This justification from the occasion arises, in the class of cases now being considered, when a communication is "made bona fide upon any subject-matter in which the party communicating has an interest, or in reference to which he has a duty, if made to a party having a corresponding

interest or duty," although the communication "contained criminating matter which, without this privilege, would be slanderous and actionable; and this though the duty be not a legal one, but only a moral or social duty of imperfect obligation." *Harrison v. Bush*, 5 El. & Bl. 344. It seems to be generally conceded, as falling within this principle, that where a master gives a character of a servant, unless the contrary be expressly proved, it will be presumed, that the character was given without malice, and the plaintiff, to support the action, must prove that the character was both falsely and maliciously given; and, although the statement as to the character should be untrue in fact, the master will be held justified by the occasion, unless it can be shown that in making the statement he was actuated by a malicious feeling, and knowingly stated what was untrue and injurious. *Starkie, Sland. & L.* 253. If, under the conditions just named, the statement be made in response to an inquiry, it would undoubtedly be privileged. *Weatherston v. Hawkins*, 1 Term R. 110; *Child v. Affleck*, 9 Barn. & C. 403. But in the case at bar it is conceded that the information was given by the appellant to Allen voluntarily, and not in response to any inquiry whatever, and this is supposed to take the case out of the privilege. It is not perceived why this circumstance should make any difference if the party has acted honestly, fairly, and without malice, though, when the information has been voluntarily given, this fact, it has been said, may in some cases have a tendency to disclose the motive of the publisher in making the publication. *Townsh. Sland. & L.* § 241. Without reviewing the decided cases, it may be said that the weight of authority is to the effect that the mere fact of the communication being voluntarily made does not necessarily exclude it as a non-privileged communication, for a publication warranted by an occasion apparently beneficial and honest is not actionable, in the absence of express malice. *Starkie, Sland. & L.* 253. Or, as stated in *Odgers, Sland. & L.* 202: "If it were found that I wrote systematically to every one to whom the plaintiff applied for work, the jury would probably give damages against me. On the other hand, if B. was an intimate friend or a relation of mine, and there was no other evidence of malice except that I volunteered the information, the occasion would still be privileged." *Rogers v. Clifton*, 3 Bos. & P. 587; *Pattison v. Jones*, 8 Barn. & C. 585. It is a question for the court whether the statement, if made in good faith, and without malice, is thus privileged. But the plaintiff has the right, notwithstanding the privileged character of the communication, to go to the jury if there be evidence tending to show actual malice, as when the words unreasonably impute crime, or the occasion of their utterance is such as to indicate, by its necessary publicity, or otherwise, a purpose wrongfully to defame the plaintiff. *Dale v. Harris*, 109 Mass. 196; *Brow v. Hathaway*, 13 Allen, 239; *Somerville v. Hawkins*, 10 C. B. 583; *Gassett v. Gilbert*, 6 Gray, 94. Or malice may be estab-

lished by showing that the publication contained matter not relevant to the occasion. Townsh. Sland. & L. § 245. Expressions in excess of what the occasion warrants do not per se take away the privilege, but such excess may be evidence of malice. *Ruckley v. Kiernan*, 7 Ir. C. L., 75; *Hotchkiss v. Porter*, 30 Conn. 414. It follows from these principles that if the communication made to Allen was made in good faith, without malice, in the honest belief of its truth, and under the conviction that it was a duty which Fresh owed to Allen to make it, the words complained of would not be actionable because privileged, though spoken voluntarily. It is equally clear that if the words spoken were known to be false and were maliciously spoken, or were voluntarily spoken to one to whom Fresh owed no duty, in the sense heretofore mentioned, the words would be actionable, because not within the privilege.

In view of these conclusions, there was error in granting the appellee's first and second instructions. Those instructions are as follows, viz.: "The plaintiff prays the court to instruct the jury that if they shall believe from the evidence that the words charged in the declaration were spoken of and concerning the plaintiff by the defendant, in the presence and hearing of other persons than the plaintiff, then the plaintiff is entitled to recover in this action." "That if the jury shall find for the plaintiff, they may award such damages as they in their judgment shall think justified by all the circumstances of the case, not only for the purpose of giving compensation for the injury done to the plaintiff, but also for the purpose of punishing the conduct of the defendant." The first instruction was wrong in omitting all reference to the defense of privilege. It directed the jury to find for the plaintiff if they believed the defendant spoke the words in the presence and hearing of other persons than the plaintiff. Under this instruction, the jury were required to return a verdict against the defendant, even though they were satisfied that the words were spoken to Allen alone, in good faith, without malice, in the full belief of their truth, and under the honest conviction that Fresh was only discharging a social duty to his neighbor in making the communication. This entirely ignored the question of privilege, which was the only defense relied on by the appellant. The second instruction was also erroneous. It allowed punitive damages to be recovered even though the jury were not required to find the existence of actual malice on the part of the appellant. In cases of this character, such is not the law. If the occasion brings the words within a qualified privilege, no damages can be recovered at all, unless the plaintiff shows that actual malice prompted the publication or utterance. The jury should have been so instructed; but they were permitted, not merely to assess damages, but punitive damages, without any regard whatever to the question of malice. It is true these instructions were taken literally from the case of *Padgett v. Sweeting*, 65 Md. 404, 4 Atl. 887,

where they were held by this court to be correct. But that case was widely different from the one at bar. In the former there was no question of privilege. The words, as here, were actionable per se, but were not, as in this case it is alleged, spoken on any occasion which justified their utterance. Under the conditions in Padgett's Case, the instructions were proper. But the same instructions could not be given in a case like the one before us now, without ignoring all the circumstances admitted in evidence respecting the occasion of the publication, the motive which inspired it, the belief of the defendant in its truth, and the honesty and good faith of its utterance.

For the error indicated in granting the appellee's first and second prayers, the judgment must be reversed, and a new trial must be awarded.

(See *Fowles v. Bowen*, 30 N. Y. 20. The general nature of "privileged communications" is well explained in *White v. Nicholls*, 3 How. 266, 11 L. Ed. 591; *King v. Patterson*, 49 N. J. Law, 417, 9 Atl. 705, 60 Am. Rep. 622; *Van Wyck v. Aspinwall*, 17 N. Y. 190.)

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(111 N. Y. 143, 19 N. E. 75, 2 L. R. A. 129, 7 Am. St. Rep. 726.)

### BYAM v. COLLINS et al.

(Court of Appeals of New York. November 27, 1888.)

#### 1. LIBEL AND SLANDER—PRIVILEGED COMMUNICATIONS—CHARACTER OF SUITOR.

A libelous letter to an unmarried woman concerning her suitor, not written at her request, but appearing to have been written at the instance of mutual friends, for the purpose of preventing her marriage to him, is not privileged by reason of previous friendship, nor by reason of a request made four years before, and before the acquaintance of the suitor was made, for information of anything known to the writer concerning any young man the person addressed "went with," or any young man in the place.

#### 2. SAME—CONFIDENTIAL COMMUNICATIONS.

Defamatory words are not privileged because uttered in strictest confidence by one friend to another, nor because they are uttered after the most urgent solicitation, nor because the interview in which they are uttered is obtained at the instance of the person slandered.

#### 3. SAME—IMPLIED MALICE.

Malice is implied as well from oral as from written defamation, where the communication is not privileged.

Appeal from Supreme Court, General Term, Fifth Department.

Action by William J. Byam against Jennie E. Collins, and Alfred H. Collins, her husband, for libel and slander. Judgment for defendants was affirmed at general term, and plaintiff appeals.

EARL, J. The general rule is that in the case of a libelous publication the law implies malice, and infers some damage. What are called "privileged communications" are exceptions to this rule. Such

communications are divided into several classes, with one only of which we are concerned in this case, and that is generally formulated thus: "A communication made bona fide upon any subject-matter in which the party communicating has an interest, or in reference to which he has a duty, is privileged, if made to a person having a corresponding interest or duty, although it contain criminating matter which, without this privilege, would be slanderous and actionable; and this though the duty be not a legal one, but only a moral or social duty of imperfect obligation." The rule was thus stated in *Harrison v. Bush*, 5 El. & Bl. 344, and has been generally approved by judges and text-writers since. In *Toogood v. Spyring*, 1 Cramp. M. & R. 181, an earlier case, it was said that the law considered a libelous "publication as malicious unless it is fairly made by a person in the discharge of some public or private duty, whether legal or moral, or in the conduct of his own affairs in matters where his interest is concerned;" and that statement of the rule was approved by *Folger, J.*, in *Klinck v. Colby*, 46 N. Y. 427, 7 Am. Rep. 360, and in *Hamilton v. Eno*, 81 N. Y. 116. In *White v. Nicholls*, 3 How. 266, 291, 11 L. Ed. 591, it was said that the description of cases recognized as privileged communications must be understood as exceptions to the general rule, and "as being founded upon some apparently recognized obligation or motive, legal, moral, or social, which may fairly be presumed to have led to the publication, and therefore prima facie relieves it from that just implication from which the general law is deduced."

Whether within the rule as defined in these cases a libelous communication is privileged, is a question of law; and when upon any trial it has been held as matter of law to be privileged, then the burden rests upon the plaintiff to establish as matter of fact that it was maliciously made, and this matter of fact is for the determination of the jury. It has been found difficult to frame this rule in any language that will furnish a plain guide in all cases. It is easy enough to apply the rule in cases where both parties—the one making and the one receiving the communication—are interested in it, or where the parties are related, or where it is made upon request to a party who has an interest in receiving it, or where the party making it has an interest to subserve, or where the party making it is under a legal duty to make it. But when the privilege rests simply upon the moral duty to make the communication, there has been much uncertainty and difficulty in applying the rule. The difficulty is to determine what is meant by the term "moral duty," and whether in any given case there is such a duty. In *Whiteley v. Adams*, 15 C. B. (N. S.) 393, *Erle, C. J.*, said: "Judges who have had from time to time to deal with questions as to whether the occasion justified the speaking or the writing of defamatory matter have all felt great difficulty in defining what kind of social or moral duty, or what amount of interest, will afford a justification;" and in the same case *Byles, J.*, said the application of the rule "to par-

ticular cases has always been attended with the greatest difficulty, the combinations of circumstances are so infinitely various."

The rule as to privileged communications should not be so extended as to open wide the flood-gates of injurious gossip and defamation, by which private character may be overwhelmed, and irreparable mischief done; and yet it should be so administered as to give reasonable protection to those who make and receive communications in which they are interested, or in reference to which they have a real, not imaginary, duty. Every one owes a moral duty not, as a volunteer in a matter in which he has no legal duty or personal interest, to defame another unless he can find a justification in some pressing emergency. In *Coxhead v. Richards*, 2 Man. G. & S. \*569, \*601, Coltman, J., said: "The duty of not slandering your neighbor on insufficient grounds is so clear that a violation of that duty ought not to be sanctioned in the case of voluntary communications, except under circumstances of great urgency and gravity. It may be said that it is very hard on a defendant to be subject to heavy damages when he has acted honestly, and when nothing more can be imputed to him than an error in judgment. It may be hard, but it is very hard, on the other hand, to be falsely accused. It is to be borne in mind that people are but too apt rashly to think ill of others. The propensity to tale-bearing and slander is so strong among mankind, and when suspicions are infused men are so apt to entertain them without due examination, in cases where their interests are concerned, that it is necessary to hold the rule strictly as to any officious intermeddling by which the character of others is affected." And in the same case Cresswell, J., said: "If the property of the ship-owner on the one hand was at stake, the character of the captain was at stake on the other; and I cannot but think that the moral duty not to publish of the latter defamatory matter which he did not know to be true was quite as strong as the duty to communicate to the ship-owner that which he believed to be true."

One may not go about in the community, and, acting upon mere rumors, proclaim to everybody the supposed frailties or bad character of his neighbor, however firmly he may believe such rumors, and be convinced that he owes a social duty to give them currency, that the victim of them may be avoided; and ordinarily one cannot with safety, however free he may be from actual malice, as a volunteer, pour the poison of such rumors into the ears of one who might be affected if the rumors were true. I cite a few cases by way of illustration. In *Godson v. Home*, 1 Brod. & B. 7, one Noah solicited the plaintiff to be his attorney in an action. The defendant, apparently a total stranger, wrote to Noah, to deprecate his so employing the plaintiff, and this was held to be clearly not a confidential or privileged communication. In *Storey v. Challands*, 8 Car. & P. 234, one Hersford was about to deal with the plaintiff, when he met the defendant, who said at once, without his opinion being asked at all, "If you have anything

to do with Storey you will live to repent it. He is a most unprincipled man," etc.; and Lord Denman directed a verdict for the plaintiff, because the defendant began by making the statement without waiting to be asked. In *York v. Johnson*, 116 Mass. 482, the defendant, a member of a church, was appointed, with the plaintiff and other members of the church, on a committee to prepare a Christmas festival for the Sunday-school. He declined to serve, and, being asked his reason by Mrs. Newton, a member of the committee, said that a third member of the committee, a married man, had the venereal disease, and, being asked where he got it said he did not know, but that "he had been with the plaintiff," who was a woman; and it was held that this was not a privileged communication. There was no question of the defendant's good faith and reasonable grounds of belief in making the communication, and yet Devens, J., in the opinion said: "The ruling requested by the defendant, that the communication made by him to Mrs. Newton was a privileged one, and not actionable except with proof of express malice, was properly refused. There was no duty which he owed to Mrs. Newton that authorized him to inform her of the defamatory charges against the plaintiff, and no interest of his own which required protection justified it. He had declined to serve upon the same committee with Mrs. York, but he was under no obligation to give any reason therefor, however persistently called upon to do so, and, even if Mrs. Newton had an interest in knowing the character of Mrs. York as a member of the same church, it was an interest of the same description which every member of the community has in knowing the character of other members of the same community with whom they are necessarily brought in contact, and would not shield a person who uttered words otherwise slanderous."

Having thus stated the general principles of law applicable to a case like this, I will now bring to mind the facts of this case so far as they pertain to the defamatory letter. The plaintiff was a lawyer, and had been engaged in the practice of his profession at Caledonia for several months, and resided there at the date of the letter. Miss Dora McNaughton and the defendant also resided there. The plaintiff was on terms of social intimacy with Dora, and was paying her attention with a view to matrimony, and some time subsequently married her. Mrs. Collins was about twenty-five years old, two years and a half younger than Dora, and was married November 2, 1875; and prior to that she had always resided within a mile and a half from the residence of Dora, and they had been very intimate friends. Dora had a father, and no brother, and Mrs. Collins had a brother. During the time of this intimacy, and at some time before the marriage of Mrs. Collins, Dora repeatedly requested of her that if she "knew anything about any young man she went with, or in fact any young man in the place, to tell her, because her father did not go out a great deal, and had no means of knowing, and people would not be apt to tell him ;

that she, Mrs. Collins, had a brother, and would be more apt to hear what was said about young men, and Dora wished her to tell what she knew. Their intimacy continued after the marriage of Mrs. Collins until January before the letter was written, when a coldness sprang up between them. They became somewhat estranged, and their intimacy ceased. Mrs. Collins testified that when she wrote the letter she thought just as much of Dora as if she had belonged to her family; that she had heard the defamatory rumors, and believed them, and therefore did not wish her to marry the plaintiff. It must be observed that the request of Dora to Mrs. Collins for information about young men was not made when she was contemplating marriage to any young man, and that the request was not for information about any particular young man, or about any young man in whom she had any interest, but it was for information about the young men generally with whom she associated. Nor, literally construing the language, did Dora wish for information as to the gossip and rumors afloat as to young men. What she asked for was such facts as Mrs. Collins knew, and not for her opinion about young men, or her estimation of them. But if we assume that the request was for information as to all the rumors about young men which came to the knowledge of Mrs. Collins, the case of the defendant is not improved. At that time the plaintiff was not within Dora's contemplation, as she did not know him until long after. The request was not for information as to any young man who might pay her attention with a view to matrimony, it was for information about all the young men in her circle. Mrs. Collins was not related to her, and was under no duty to give the information, and Dora had no sufficient interest to receive the information. Mrs. Collins was under no greater duty to give the information to Dora than to any of the other young ladies of her acquaintance in the same circle. She could properly tell what she knew about young men, but could not defame them even upon request by telling what she did not know, what nobody knew, but what she believed upon mere rumors and hearsay to be true. The mere fact that she was requested or even urged to give the information did not make the defamatory communication privileged. *York v. Johnson*, supra.

But there is no proof that this letter was written to Dora in pursuance of any request made by her four years before its date, and there was no evidence which authorized the jury to find so, if they did so find. On the contrary, it is clear that Dora would not at the time have gone to Mrs. Collins for any information as to the plaintiff if she had desired any, and that she did not wish for the information from her; and that this was known to Mrs. Collins the language of the letter clearly shows. In the defendant's answer it is alleged that Mrs. Collins' letter was prompted by her friendship for Dora, and by the solicitations of "mutual friends to interfere in the matter and break

off the relations which seemed to exist between the plaintiff and Dora," and there is no averment that it was written in pursuance of any request coming from Dora. The letter itself, as well as the evidence of Mrs. Collins, shows unmistakably that it was thus prompted. Mrs. Collins did not testify that she wrote the letter in pursuance of any request of Dora, and the action was not tried upon that theory, and no question as to the request was submitted to the jury. The trial judge charged the jury broadly that if the relations of Dora and Mrs. Collins were of such an intimate character as to warrant the latter in warning the former "against a person whom she had reason to believe was not a fit person, and if Mrs. Collins acted fairly, in good faith, conscientiously, although mistakenly, there can be no recovery against her" upon the count in the complaint for libel; and then the court said: "Did Mrs. Collins, in writing that letter, act fairly, act judiciously, not in the matter of good taste, but did she with the facts which had been brought to her mind act in a conscientious and proper manner? If she did, if she acted as an ordinarily prudent person would act under the same circumstances, if she had probable ground for her belief, she was justified in writing the letter." Mrs. Collins then appears as a mere volunteer, writing the letter to break up relations which she feared might lead to the marriage of the plaintiff to Dora. If she had been the mother of Dora, or other near relative, or if she had been asked by Dora for information as to the plaintiff's character and standing, she could with propriety have given any information she possessed affecting his character, provided she acted in good faith, and without malice. But a mere volunteer, having no duty to perform, no interest to subserve, interferes with the relations between two such people at her peril. The rules of law should not be so administered as to encourage such intermeddling, which may not only blast reputation, but possibly wreck lives. In such a case the duty not to defame is more pressing than the duty to communicate mere defamatory rumors not known to be true.

Some loose expressions may doubtless be found in text-books and judicial opinions supporting the contention of the defendant that this letter was in some sense a privileged communication. But after a very careful research I believe there is absolutely no reported decision to that effect. The case which is as favorable to the defendant as any, if not more favorable than any other, is that of *Todd v. Hawkins*, 8 Car. & P. 88. In that case a widow being about to marry the plaintiff, the defendant, who had married her daughter, wrote her a letter containing imputations on the plaintiff's character, and advising a diligent and extensive inquiry into his character; and it was held that the letter was written on a justifiable occasion, and that the defendant was justified in writing it, provided the jury were satisfied that in writing it he acted bona fide, although the imputations contained in the letter were false, or based upon the most erroneous in-

formation, and if he used expressions however harsh, hasty, or untrue, yet bona fide, and believing them to be true, he was justified in so doing. The letter was held privileged solely upon the ground of the near relationship existing between the widow and the defendant, her son-in-law, which justified his voluntary interference. But the judge expressly stated that if the widow and defendant had been strangers to each other there would have been a mere question of damage. A case nearer in point is that of *Count Joannes v. Bennett*, 5 Allen, 169, 81 Am. Dec. 738. There it was held that a letter to a woman containing libelous matter concerning her suitor cannot be justified on the ground that the writer was her friend and former pastor, and that the letter was written at the request of her parents, who assented to all its contents. The decision was put upon the ground that in writing the letter the defendant had no interest of his own to serve or protect; that he was not in the exercise of any legal or moral duty; that the proposed marriage did not even involve any sacrifice of his feelings or injury to his affections, and did not in any way interfere with or disturb his personal or social relations; that the person to whom the letter was addressed was not connected with him by the ties of consanguinity or kindred, and that he had no peculiar interest in her. Some years before, the same learned court decided the case of *Krebs v. Oliver*, 12 Gray, 239, wherein it was held that statements that a man has been imprisoned for larceny, made to the family of a woman whom he is about to marry, by one who is no relation of either, and not in answer to an inquiry, are not privileged communications. In the opinion it is said: "A mere friendly acquaintance or regard does not impose a duty of communicating charges of a defamatory character concerning a third person, although they may be told to one who has a strong interest in knowing them. The duty of refraining from the utterance of slanderous words without knowing or ascertaining their truth far outweighs any claim of mere friendship." I am therefore of opinion that the letter was in no sense, upon the facts as they appear in the record, a privileged communication.

There was also error in the court below as to the verbal slanders alleged in the second cause of action; and what I have already said applies in part to these verbal slanders. There was no substantial denial of these slanders in the answer, and there is no dispute in the evidence that they were uttered, and there can be no claim upon the evidence that they were justified. The trial judge charged the jury that the words were slanderous. But he said to them that "there is not that presumption of malice in the case of oral slanders that there is in the case of a deliberate writing." This was excepted to by plaintiff's counsel, and was clearly erroneous. In the case of oral defamation, as in the case of written, if the words uttered were not privileged the law implies malice. The judge further charged the jury, in sub-

stance, that the words, if uttered under the circumstances testified to by Mrs. Collins, were privileged. She testified, in substance, that she uttered the words to Mr. Cameron in confidence, after the most urgent solicitation on his part that she should tell him what she knew about the plaintiff. But defamatory words do not become privileged merely because uttered in the strictest confidence by one friend to another, nor because uttered upon the most urgent solicitation. She was under no duty to utter them to him, and she had no interest to subserve by uttering them. He had no interest or duty to hear the defamatory words, and had no right to demand that he might hear them; and under such circumstances there is no authority holding that any privilege attaches to such communications. There was no evidence that would authorize a jury to find that Cameron sought the interview with Mrs. Collins as an emissary from or agent of the plaintiff, or that at the plaintiff's solicitation or instigation he obtained the slanderous communications from her; and he did not profess or assume to act for him on that occasion. He was the mutual friend of the parties, and seems to have sought the interview with her either to gratify his curiosity, or to prevent the impending litigation between the parties. But, even if he obtained the interview with her at the solicitation of the plaintiff and as his friend, she could not claim that her slanderous words uttered at such interview were privileged. The trial judge therefore erred in refusing to charge the jury that there was no question for them as to the second cause of action but one of damages.

Therefore, without noticing other exceptions to rulings upon the trial, for the fundamental errors herein pointed out the judgment should be reversed, and a new trial granted.

All concurred, except DANFORTH, J., who dissented.

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(46 N. Y. 188, 7 Am. Rep. 322.)

**SUNDERLIN et al. v. BRADSTREET et al.**

(Court of Appeals of New York. September 7, 1871.)

**LIBEL—PRIVILEGED COMMUNICATIONS—MERCANTILE AGENCY.**

Proprietors of a mercantile agency, whose business is collecting and communicating to subscribers information as to the character, credit, and pecuniary responsibility of merchants, are liable for a false and injurious report of the failure of certain merchants, published and circulated among all the subscribers; as such a communication is privileged only when made in good faith, to one having an interest in the information. That the libelous statement was in cipher, understood by the subscribers only, is not material.

Appeal from Supreme Court, General Term, Seventh Judicial District.

Action by Lewis Sunderlin and others against Henry Bradstreet and others for libel. Defendants, proprietors of a mercantile agency, published and circulated among the subscribers to their agency a report that plaintiffs, who were merchants, had failed. The report was admitted to be false. At the trial, a verdict was rendered for plaintiffs, and defendants' exceptions were ordered to be heard in the first instance at the general term, which overruled the exceptions, and directed judgment for plaintiffs on the verdict. Defendants appealed from the judgment.

ALLEN, J. The only question presented by the appeal has respect to the character and occasion of the publication of the alleged libel, and is, whether the circumstances and occasion of the publication were such as to absolve the defendants from liability, in the absence of proof of express malice; that is, whether it is within the protection of privileged communications. We might properly decide this question upon the authority of *Taylor v. Church*, 8 N. Y. 452, in which this precise question was determined by a unanimous court, seven judges taking part in the decision, the other judge refraining from expressing an opinion, for the reason that he was not present at the argument. The point was made upon the trial of the action, and presented by counsel upon appeal in this court, and was material to be decided for the guidance of the court below, upon a retrial which this court ordered. inasmuch as, if the publication was privileged, it would probably be fatal to the plaintiff's cause of action, and the court, by a deliberate and formal resolve, adjudged that the alleged libel was not a privileged communication. The circumstances under which this judgment was given, as well as the method adopted by the judges in determining this precise question by a formal declaration, entitle the decision to peculiar weight as an authority. That case cannot be distinguished from this in any circumstance favorable to the defendant.

The decision, as abstracted by the reporter, was that "one who undertakes, for an association of merchants in New York, to ascertain the pecuniary standing of merchants and traders residing in other places, who are customers of some of the members of the association, and who furnishes reports to all the members of the association, irrespective of the question whether they have an interest in the question of the standing of such merchants and traders, is liable for any false report made by him prejudicial to the credit of the subject of it, although made honestly, and from information upon which he relied." In the case before us, the defendants were in no sense the agents of an association of merchants, or of their patrons. Of their own volition, and for their own profit, they established a bureau for collecting and disseminating information as to the character, credit, and pecuniary responsibility of merchants and traders throughout the United States. The business is in the nature of an intelligence office; and it

is not intended by this to intimate that it is not an entirely lawful and reputable business; or that it is not of general utility; or perhaps a necessity to the commerce and business of the country. All may be conceded that is claimed for it by its friends; but in its conduct and management it must be subjected to the ordinary rules of law, and its proprietors and managers held to the liability which the law attaches to like acts by others. The information acquired by them was their own, and was communicated to others or made public in such form and upon such terms as the defendants dictated. In the established course of their business, they communicated with their patrons by means of semi-annual publications, with weekly corrections printed and furnished to each; the number of copies of each publication being about 10,000, distributed to every part of the country, among merchants, bankers, and traders. The alleged libel was published in one of the weekly corrections of the regular semi-annual publications, and was thus extensively circulated. Its distribution was general among all the subscribers to the defendants' publications, irrespective of their interest in the question of the plaintiffs' credit and standing.

Whether a libel or slander is within the protection accorded to privileged communications depends upon the occasion of the publication or utterance, as well as the character of the communication. The party must have a just occasion for speaking or publishing the defamatory matter. A communication is privileged, within the rule, when made in good faith, in answer to one having an interest in the information sought; and it will be privileged if volunteered when the party to whom the communication is made has an interest in it, and the party by whom it is made stands in such relation to him as to make it a reasonable duty, or, at least, proper that he should give the information. *Todd v. Hawkins*, 8 Car. & P. 88; *Cockayne v. Hodgkisson*, 5 Car. & P. 543; *Washburn v. Cooke*, 3 Denio, 110; per *Selden, J.*, *Lewis v. Chapman*, 16 N. Y. 369. It is not necessary to go further in this case; and it may be assumed that, if any one having an interest in knowing the credit and standing of the plaintiffs, or whom the defendants supposed and believed had such interest, had made the inquiry of the defendants, and the statement in the alleged libel had been made in answer to the inquiry in good faith, and upon information upon which the defendants relied, it would have been privileged. This was the case of *Ormsby v. Douglass*, 37 N. Y. 477. The business of the defendant in that action was of a similar character to that of the present defendants; and the statement complained of was made orally, to one interested in the information, upon personal application at the office of the defendant, who refused to make a written statement. There was no other publication, and it was held that the occasion justified the defendant in giving such information as he possessed to the applicant. *Taylor v. Church* was referred to as authority for the rule, and, so far from being overruled or questioned, was af-

firmed. The decision in *Taylor v. Church* was placed upon the ground that the alleged libel was printed by the procurement of the defendant, and distributed by him to persons having no special interest in being informed of the condition of the plaintiffs' firm. In the case at bar, it is not pretended but that few, if any, of the persons to whom the 10,000 copies of the libelous publication were transmitted had any interest in the character or pecuniary responsibility of the plaintiffs, and to those who had no such interest there was no just occasion or propriety in communicating the information. The defendants, in making the communication, assumed the legal responsibility which rests upon all who, without cause, publish defamatory matter of others; that is, of proving the truth of the publication, or responding in damages to the injured party. The communication of the libel to those not interested in the information was officious and unauthorized, and therefore not protected, although made in the belief of its truth, if it were, in point of fact, false. When a communication is made in the discharge of some public or private duty, the occasion prevents the inference of malice which the law draws from unauthorized communications, and affords a qualified defense, depending on the absence of malice. *Toogood v. Spyring*, 1 Crompt. M. & R. 181; *Fowles v. Bowen*, 30 N. Y. 20. There has been no diversity in the utterances of judges and courts upon the subject, but all have spoken one language. See *Beardsley v. Tappan*, 5 Blatchf. 498, Fed. Cas. No. 1,189. In those cases in which the publication has been held privileged, the courts have held that there was a reasonable occasion or exigency, which, for the common convenience and welfare of society, fairly warranted the communication as made. But neither the welfare nor convenience of society will be promoted by bringing a publication of matters, false in fact, injuriously affecting the credit and standing of merchants and traders, broadcast through the land, within the protection of privileged communications. The principle of *Taylor v. Church* is recognized in all the cases. *Harris v. Thompson*, 13 C. B. 333; *Van Wyck v. Aspinwall*, 17 N. Y. 190; *Harrison v. Bush*, 5 El. & Bl. 344; *Goldstein v. Foss*, 6 Barn. & C. 158; *Getting v. Foss*, 3 Car. & P. 160. The fact that the libelous statement was in cipher is not material. It was in language understood by the numerous patrons of the defendants and all the subscribers to the publications. They had the key to the cipher, and the publication was equally significant and injurious as if made in the distinct terms, in the very words, indicated by the numeral figures used. The judgment should be affirmed.

All concur.

Judgment affirmed.

(To the same effect are *Erber v. Dun* [C. C.] 12 Fed. 526; *Trussell v. Scarlett* [C. C.] 18 Fed. 214; *Locke v. Bradstreet Co.* [C. C.] 22 Fed. 771; *King v. Patterson*, 49 N. J. Law, 417, 9 Atl. 705, 60 Am. Rep. 622; *Pollasky v. Minchener*, 81 Mich. 280, 46 N. W. 5, 9 L. R. A. 102, 21 Am. St. Rep. 516;

*Mitchell v. Bradstreet Co.*, 116 Mo. 226, 22 S. W. 358, 724, 20 L. R. A. 138, 38 Am. St. Rep. 592. Where the agency had received from one of its agents the information about a merchant that he had made an assignment to secure the assignee for indorsing a note, but in communicating the information to subscribers it stated that the merchant had made a general assignment for the benefit of creditors, *held*, that this departure from the information received, if due to carelessness, destroyed the privilege. *Douglass v. Daisie*, 114 Fed. 628, 52 C. C. A. 324, 57 L. R. A. 475.)

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(59 Mich. 467, 26 N. W. 671, 60 Am. Rep. 307.)

BRONSON v. BRUCE (in part).

(Supreme Court of Michigan. February 3, 1886.)

**1. LIBEL—NEWSPAPER PUBLICATIONS CONCERNING CANDIDATES FOR OFFICE—MALICE—PRIVILEGED COMMUNICATIONS—DAMAGES.**

The qualifications and acts of public officers and candidates for office may be freely commented upon and criticised by newspapers, or voters, or others having an interest, if the comment be bona fide and without malice; but false charges of crime against officers or candidates, though made without malice and in an honest belief of their truth, are not privileged communications.

**2. SAME.**

A candidate for congress was accused, in a newspaper published in his congressional district, with forgery, with stealing the deposits of poor men, and with cheating laboring men of their hard earnings. *Held*, that these charges were not privileged, even if published with belief in their truth.

Error to Mecosta.

CHAMPLIN, J. At the general election in the year 1882, the plaintiff was a candidate for congress. The defendant was then editor and publisher of the Big Rapids Current, a newspaper published in the city of Big Rapids, in the county of Mecosta, and circulated in that and other counties in the congressional district which was sought to be represented in congress by the plaintiff, as well as in other counties of the state outside of said district. The defendant, through the columns of his newspaper, opposed the election of the plaintiff to the office for which he was a candidate, and supported the election of the opposing candidates. After the plaintiff was placed in nomination for the office, and before the election to be held for representative in congress, the defendant published in his paper, and circulated throughout the district, and sent the same to exchanges in other parts of the state, certain articles concerning the plaintiff which the plaintiff claims to be libelous, and this action is brought to recover damages therefor. The defendant pleaded the general issue, and gave notice (1) that he would prove that he was justified in so doing, for the reason that the alleged defamatory matter, and the several statements in the articles

so published by defendant, were each true in substance and in fact as published; and (2) that the same was a privileged communication, and statements therein were bona fide comments upon the acts and statements of said plaintiff of the several matters referred to therein, and of the acts, statements, and conduct of the plaintiff in reference thereto, and of and concerning the plaintiff as a public man, and made for the public good, and were published as such comments without any malicious intent or motive whatever. At the trial the publication was not disputed, or that the article is libelous if not true. It charged him with the crime of forgery; of the theft of deposits of poor men and women; and of cheating laboring men of their hard earnings.

The learned judge, after stating that privileged communications are of two kinds, and defining and illustrating what is absolute privilege, instructed the jury relative to qualified privilege as follows: "There is another kind of privilege which is not absolute, but which is conditioned, on the theory that there is no malice on the part of the person uttering the communication or publishing the libel. It is competent—it is justifiable—for the press to comment upon the character and standing—intellectually, morally, physically, and otherwise—of a man who offers himself as a candidate for office of trust. I say it is competent to do that, depending, of course, upon the circumstances of the case and the surroundings. When a man sees fit to take the stand before his constituency for a public position and public honors, he thereby, to a certain extent, makes himself public property, subjects himself to criticism by his constituency. And if it is made to appear that the criticism is just, is proper, is made in good faith, is made without malice and for the public good, for the purpose, as supposed by the person at the time, to prevent an incompetent and unfit and unsuitable person from receiving the majority of the votes of the electors of the district, or as the case may be, that article is *prima facie* privileged, and the law will require of the party who complains of the article to show that the same was published with bad motives, and not for good ends and purposes. \* \* \* When that is shown, that privilege vanishes, and it is no longer a protection to the person apparently covered by it in the first instance. In this case, gentlemen, it appears beyond dispute that, at the time of the publication of these articles, Mr. Bronson was a candidate on a fusion ticket for congress from this congressional district, and was then before the people for that purpose. These articles were published of and concerning him, reflecting upon his character and standing as a man, and his connection with the Exchange Bank, etc. And it is claimed by Mr. Bruce that he published these with good motives and justifiable ends, and with no malice whatever. That is his claim. If that is true; if he had no malice, no disposition to specially injure this man, Mr. Bronson, but published the same in good faith, honestly believing that the occasion required it,—then the communication is privileged, and the plaintiff

cannot recover in this suit, even though the communications themselves were false; because if they were privileged by the occasion, that is a complete justification to the action. Right here is the starting point in the case: Were the articles privileged? They are *prima facie* privileged by the occasion, in my judgment, and I so charge you as matter of law. But it will be for you to determine whether this man Bruce, in the publication of the article, was actuated by private malice, or malice of any sort, at that time. If so, then that privilege ceased."

The constitution of this state provides that "no law shall ever be passed to restrain or abridge the liberty of speech or of the press; but every person may freely speak, write, and publish his sentiments on all subjects, being responsible for the abuse of such right." Article 4, § 42. The publisher of a newspaper possesses no immunity from liability in publishing a libel other or different than any other person. The law makes no distinction between the newspaper publisher and any private person who may publish an article in a newspaper or other printed form; and if either of them abuses the right to publish his sentiments on any subject and upon any occasion, he must defend himself upon the same legal ground.

As was said by the supreme court of West Virginia in *Sweeney v. Baker*, 13 W. Va. 183, 31 Am. Rep. 757: "The fact that one is a candidate for office in the gift of the people affords, in many instances, a legal excuse for publishing language concerning him as such candidate for which publication there would be no legal excuse if he did not occupy the position of such candidate, whether the publication is made by the proprietors of a newspaper, or by a voter or other person having an interest in the election. The conduct and actions of such candidate may be freely commented upon, his acts may be canvassed, and his conduct boldly censured. Nor is it material that such criticism of conduct should, in the estimate of the jury, be just. The right to criticise the action or conduct of a candidate is a right, on the part of the party making the publication, to judge himself of the justness of the criticism. If he was liable for damages in an action for libel for a publication criticising the conduct or action of such a candidate, if a jury should hold his criticism unjust, his right of criticism would be a delusion,—a mere trap. The only limitation to the right of criticism of the acts or conduct of a candidate for an office in the gift of the people is that the criticism be *bona fide*. As this right of criticism is confined to the acts or conduct of such candidate, whenever the facts which constitute the act or conduct criticised are not admitted, they must of course be proven. \* \* \* His talents and qualification, mentally and physically, for the office he asks at the hands of the people may be freely commented on in publications in a newspaper, and, though such comments be harsh and unjust, no malice will be implied; for these are matters of opinion of which the

voters are the only judges; but no one has a right by a publication to impute to such candidate, falsely, crimes, or publish allegations affecting his character falsely."

The authorities are numerous, and fully sustain the position that a publication in a newspaper concerning either a public officer, or a candidate for an elective office, which falsely imputes to him a crime, is not privileged by the occasion, either absolutely or qualifiedly, but such publication is actionable per se; the law imputing malice to the publisher or author. *Comm. v. Clap*, 4 Mass. 165; *Curtis v. Mussey*, 6 Gray, 261; *Aldrich v. Press Printing Co.*, 9 Minn. 133 (Gil. 123); *Seely v. Blair*, *Wright* (Ohio) 358, 683; *Root v. King*, 7 Cow. 613; *King v. Root*, 4 Wend. 113; *Rearick v. Wilcox*, 81 Ill. 77, 81; *Com. v. Odell*, 3 Pittsb. 449-459; *Brewer v. Weakley*, 2 Overt. 99.

The electors of a congressional district are interested in knowing the truth, not falsehoods, concerning the qualifications and character of one who offers to represent them in congress; and it is the right and privilege of any elector, or person also having an interest to be represented, to freely criticise the acts and conduct of such candidate, and show, if he can, why such person is unfit to be intrusted with the office, or why the suffrages of the electors should not be cast for him. But defamation is not a necessary and indispensable concomitant of an election contest.

If public virtue is to prevail, and distinguish the execution of high public trusts, candidates for those positions must be men of virtue, as well as men of character and capability; and the stability of our institutions in a great measure depends upon the confidence and esteem in which those occupying such high positions are held by their fellow-citizens. This cannot be attained if charges of crime against them, which are falsely made or circulated in the community, are absolutely privileged, though made in good faith. I think the circuit judge erred in laying down such rule.

The judgment must be reversed, and a new trial granted. The other justices concurred.

(This is the generally established doctrine, both in England and this country. See, for example, as to public officers, *Davis v. Shepstone*, L. R. 11 App. Cas. 187; *Post Pub. Co. v. Hallam*, 59 Fed. 530, 8 C. C. A. 201; *Burt v. Advertiser Newspaper Co.*, 154 Mass. 238, 28 N. E. 1, 13 L. R. A. 97; *Bee Pub. Co. v. Shields* [Neb.] 94 N. W. 1029; *Herringer v. Ingberg* [Minn.] 97 N. W. 460; *Hamilton v. Eno*, 81 N. Y. 116; *Benton v. State*, 59 N. J. Law, 551, 36 Atl. 1041. As to candidates for office, see *Donahoe v. Star Pub. Co.* [Del.] 55 Atl. 337; *Coffin v. Brown*, 94 Md. 190, 50 Atl. 567, 55 L. R. A. 732, 89 Am. St. Rep. 422; *Jarman v. Rea*, 137 Cal. 339, 70 Pac. 216; *Smurthwaite v. News Pub. Co.*, 124 Mich. 377, 83 N. W. 116; *Smith v. Burrus*, 106 Mo. 94, 16 S. W. 881, 13 L. R. A. 59, 27 Am. St. Rep. 329. But the discrimination between "comment" or "criticism" on the one hand, and "false accusation" on the other, is sometimes found difficult. *Elkhoff v. Gilbert*, 124 Mich. 353, 83 N. W. 110, 51 L. R. A. 451; *Evening Post Co. v. Richardson* [Ky.] 68 S. W. 665.

In a few states an action will not lie, even if false charges are made against public men, if they are made in good faith, with an honest belief in their truth, and solely for the purpose of informing the electors. *State v. Balch*, 31 Kan. 465, 2 Pac. 609; *Bays v. Hunt*, 60 Iowa, 251. 14 N. W. 785; *State v. Keenan*, 111 Iowa, 286, 82 N. W. 792. It is sometimes added that the charges must be based on reasonable grounds. *O'Rourke v. Publishing Co.*, 89 Me. 310, 36 Atl. 398.

An analogous doctrine, now well settled, is that any one may comment upon matters of public interest, if the comment be fair and reasonable and without malice; as, e. g., upon theatrical and other public performances [*Cherry v. Des Moines Leader*, 114 Iowa, 298, 86 N. W. 323, 54 L. R. A. 855, 89 Am. St. Rep. 365; *McQuire v. Western Morning News Co.* (1903) 2 K. B. 100]; public exhibitions, and whatever is there exhibited, as paintings, statuary, etc. [*Gott v. Pulsifer*, 122 Mass. 235, 23 Am. Rep. 322, also ante, p. 69; *Thompson v. Shackell, M. & M.* 187]; published books and articles [*Campbell v. Spottiswoode*, 3 B. & S. 769; *Reade v. Sweetzer*, 6 Abb. Pr. (N. S.) 9]; the architecture of public buildings [*Bearce v. Bass*, 88 Me. 540, 34 Atl. 411, 51 Am. St. Rep. 446]; the way in which public affairs are conducted, etc. [*Wason v. Walter*, L. R. 4 Q. B. 73; *Purcell v. Sowler*, L. R. 2 C. P. D. 218; *Wilcox v. Moore*, 69 Minn. 49, 71 N. W. 917].

The publication of a fair and true report of legislative and judicial proceedings is also privileged, even though such proceedings contain defamatory matter. *Garby v. Bennett*, 166 N. Y. 392, 59 N. E. 1117; *Conner v. Standard Pub. Co.*, 183 Mass. 474, 67 N. E. 596; *Macdougall v. Knight*, 17 Q. B. D. 636; *Kimber v. Press Ass'n* [1893] 1 Q. B. 65; *Stuart v. Press Pub. Co.*, 83 App. Div. 467, 82 N. Y. Supp. 401; *Beiser v. Scripps-McRae Pub. Co.* [Ky.] 68 S. W. 457.)

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(122 N. Y. 445, 25 N. E. 919.)

WOODS v. WIMAN.

(Court of Appeals of New York, Second Division. December 2, 1890.)

**LIBEL—PETITION TO GOVERNOR OF STATE—PRIVILEGE—PUBLICATION.**

Information communicated to the governor of a state by citizens thereof for the purpose of influencing his action on a bill which has passed the legislature is *prima facie* privileged; and, if a printed pamphlet containing the information is given to the governor himself and to no one else, an action for libel will not lie in behalf of a person as to whom the pamphlet contains defamatory matter, there being no evidence of malice; but if the communication is unnecessarily published to other persons, such publication is not privileged.

Appeal from a judgment of the general term of the second judicial department, affirming a judgment dismissing the complaint.

When the bill which became chapter 672 of the Laws of 1886, relating to imprisonment for debt, was pending in the legislature, Mr. Edward P. Wilder, a lawyer, published a pamphlet in opposition to its passage. Mr. Gilbert R. Hawes, a lawyer, was retained by the debtors imprisoned in Ludlow-Street jail to advocate the passage of the measure, and, to advance this purpose, one McDonald, then imprisoned in that jail on an execution against his person, took from his

fellow-prisoners statements of the causes and circumstances of their confinement, which he reduced to writing, and delivered to Mr. Hawes. A few copies of these statements were printed in a pamphlet bearing this title: "Prisoners now in Ludlow-Street jail. A true statement of the facts in each case where a party has been imprisoned for debt. In answer to the pamphlet issued by E. P. Wilder." The pamphlet contained the following, among other statements: "In re Terrence Monett. About nine years ago sued on breach of promise to marry, which he never made. An open secret that plaintiff had similar relations for money with five or six others; but, being married men, their evidence unattainable at trial. Sympathy for her sex. Awarded \$6,000 damages. His interest sold by sheriff at sale, and bought by plaintiff for \$5,500. The matter then slept for eight years, when an attorney, a friend of plaintiff, dug it up. Both plaintiff and defendant had always lived in Brooklyn, and still so in December, 1884, and the suit and judgment had in Brooklyn court. Instead of issuing execution against him where they both lived, and where the court was that granted judgment, they had him decoyed from Brooklyn to New York, whither they had brought over the execution against the person, thus cutting off from bail in place of domicile; further embarrassing, as New York sheriff requires bondsmen within his limits. Also saved plaintiff expense of support in Brooklyn jail, and, to increase disadvantages of defendant, omitted to credit him, on judgment, with \$5,500, bid for his interest in the property at sheriff's sale by plaintiff eight years before, so he was thus arrested on full amount, \$6,000, of judgment. Thus debarred from ability to give bail, has been eighteen months in jail. On trying to go out under Fourteen Day Act, could not produce written vouchers for expenditure of a few hundred dollars eight or nine years ago; so judge said oral evidence was not sufficient, and denied application. His wife's friends offer to subscribe balance really due on judgment, but plaintiff says that, as she cannot have him, his wife (now of nine years) shall not. So this kind of a woman actually separates man and wife to be gratified in her spiteful feelings; but, worst of all, public law aids such." The bill excited much public interest and discussion, and a committee was appointed, of which the defendant was chairman, to advocate its passage and approval by the executive. After the bill had passed the legislature, the governor fixed a day for hearing a public discussion of its merits. For the purpose of influencing the executive action, and as an answer to the pamphlet put forth by Mr. Wilder, a few copies of the statements of the prisoners, as taken by Mr. McDonald, were carried to the capitol, and one of them was submitted by the defendant to the executive with resolutions adopted by the chamber of commerce, and a memorial signed by several hundred of the citizens of New York and Brooklyn advocating the bill. It is alleged in behalf of the plaintiff that the defendant gave a copy

of the pamphlet to the governor, and distributed several copies to persons in the executive chamber, for which alleged publications she seeks to recover damages. On the trial, the plaintiff was nonsuited, upon which a judgment was entered, which was affirmed at general term.

FOLLETT, C. J. Whether the public statutes of the state shall be changed is a matter of general interest, and of common concern, and information given to the governor for the purpose of influencing his action on a bill which has passed the legislature is *prima facie* privileged; but, if the communication contains defamatory matter, and is unnecessarily published to others, such publication is not privileged. *Coffin v. Coffin*, 4 Mass. 1, 3 Am. Dec. 189; *Rex v. Creevey*, 1 Maule & S. 273; *Odgers, Sland. & L.* (2d Ed.) 186; *Folk. Starkie, Sland. & L.* 202, 205; *Newell, Defam.* 471; *Townsh. Sland. & L.* (4th Ed.) § 217. Had the pamphlet been given only to the executive, we should have no difficulty in sustaining the judgment, on the ground that there was no evidence of malice, without proof of which an action cannot be sustained for such a publication. But one witness testified that he saw the defendant give copies of the pamphlet to persons in the executive chamber, who did not appear to have any connection with the hearing, which was then being held; and, though he was strongly contradicted by persons who had every facility for observing what occurred, yet whether the defendant did distribute the pamphlet, as testified by this witness, was a question of fact, and the court erred in not submitting it to the jury with appropriate instructions. For this error the judgment must be reversed, and a new trial granted, with costs to abide the event. All concur.

Judgment reversed.

(See also *Proctor v. Webster*, 16 Q. B. Div. 112; *Jenoure v. Delmege* [1891] App. Cas. 73; *White v. Nicholls*, 3 How. 266, 11 L. Ed. 591; *Gray v. Pentland*, 2 Serg. & R. 23; *Id.*, 4 Serg. & R. 420; *Larkin v. Noonan*, 19 Wis. 82.)

## 2. Absolute privilege.

(123 N. Y. 420, 25 N. E. 1048, 11 L. R. A. 753.)

MOORE v. MANUFACTURERS' NAT. BANK et al. (In part).

(Court of Appeals of New York. December 2, 1890.)

### 1. LIBEL AND SLANDER—ABSOLUTE PRIVILEGE—JUDICIAL PROCEEDINGS.

Defamatory statements made in the course of judicial proceedings are absolutely privileged. However malicious the intent, or however false the charge may have been, the law, on grounds of public policy and to secure the administration of justice, denies to the defamed party any remedy through an action for libel or slander, as, e. g., where slanderous

statements are made by parties, counsel, or witnesses, or libelous charges are contained in pleadings, affidavits, and other papers used in the action. This privilege, however, does not extend to such matters as are irrelevant to the litigation.

2. SAME.

A bank sued the sureties on the bond of its cashier for a misappropriation of its funds by the cashier, and served a bill of particulars of the defalcation on defendants' attorney in that action, which charged the funds to have been misappropriated "by collusion with the teller." The bank also gave to a representative of the defendants, at his request, a similar statement of the defalcation. *Held*, that the statements in respect to the teller were not privileged, and were prima facie a libel upon him, for which he could maintain an action.

Appeal from Supreme Court, General Term, Third Department.

Action by Amasa R. Moore against the Manufacturers' National Bank of Troy, and Gleason, its cashier. A verdict for \$200 damages was returned. On appeal by plaintiff the judgment entered on such verdict was affirmed by the general term (4 N. Y. Supp. 378), and plaintiff again appeals.

ANDREWS, J. This is an action for libel. On the trial the plaintiff recovered a small verdict. He appealed to the general term from the judgment in his own favor, on the ground that the trial judge admitted improper evidence offered by the defendants, and also that he erroneously submitted to the jury the question whether certain facts alleged in the answer of the defendants, in mitigation of damages, existed, although there was an absence of any proof to sustain such allegations. It is claimed that by reason of these errors the plaintiff was prejudiced in respect to the award of damages. There is, we think, no doubt that errors were committed by the trial judge in the respects mentioned. The plaintiff is therefore entitled to a new trial unless the defendant is right in his contention that the alleged libel was a privileged publication, and therefore no recovery whatever was justified. It will be sufficient to state very briefly the facts upon which the action is based, in order to present the question to be determined. In 1883 the Manufacturers' National Bank of Troy, claiming that its cashier had misappropriated and embezzled the property and funds of the institution, brought an action on the cashier's bond against the surviving surety and the representatives of a deceased surety to recover the amount of the alleged defalcation. The agent of some of the defendants in the action thereupon applied in writing to the attorneys of the bank for a statement of the claim. This was furnished, but not in detail, and the agent of the sureties, desiring fuller information, called at the banking-house of the bank, and there had an interview with the cashier, and requested him to furnish as particular and complete an account as he could "so that we could see how we stood." In compliance with the request, the bank,

by its cashier, prepared and delivered to the agent of the sureties a paper indorsed, "A partial statement in detail of the defalcations of A. B., late cashier of the Manufacturers' National Bank of Troy," which contained an itemized account, with dates and amounts constituting the claim. The account comprised a statement of alleged false charges made by the cashier in the accounts of depositors, items for drafts and securities of the bank abstracted, and, in addition, items amounting in the aggregate to \$16,621.95, entered in the account as "cash items drawn from the bank by collusion with the teller, without the knowledge or authority of the officers of the bank." The alleged libel for which this action is brought is founded on the words "by collusion with the teller," contained in this statement, and also on a repetition of the same words in a similar account subsequently furnished as a bill of particulars in the action, on the demand of the attorneys for the sureties. The plaintiff in the present action was the teller of the bank during the period of the alleged defalcations by the cashier, and no question is made but that the words "by collusion with the teller," contained in the statement delivered to the agent of the sureties, and in the bill of particulars, referred to him. It cannot admit of question that the publication was libelous, and sustained the action, unless the publication was, as claimed, privileged. It charged the plaintiff with complicity in the crime of embezzlement committed by the cashier. The words are susceptible of no other interpretation.

There are many examples in the books of communications held to be privileged, where the same words, if used other than on a lawful occasion, would be libelous; but which, by reason of the occasion when they were published or spoken, will not sustain an action, although proved to be untrue, unless proved to have been spoken maliciously. The cases of charges made in giving the character of a servant, or in answering an authorized inquiry concerning the solvency of a tradesman, or where the communication was confidential between parties having a common interest in the subject to which it relates, are illustrations. *Bronson, C. J., Washburn v. Cooke*, 3 Denio, 112. In these and like cases the privilege is not absolute, but conditional; that is to say, the occasion being lawful, the communication is *prima facie* privileged, and rebuts the inference of malice which would otherwise arise, and imposes on the plaintiff who prosecutes an action of slander or libel the burden of proving that the defendant was moved by actual malicious intent in making the communication, and, failing in that, he fails in the action.

There is another class of privileged communications where the privilege is absolute. They are defined in *Hastings v. Lusk*, 22 Wend. 410, 34 Am. Dec. 330. In this class are included slanderous statements made by parties, counsel, or witnesses in the course of judicial proceedings, and also libelous charges in pleadings, affidavits, or other

papers used in the course of the prosecution or defense of an action. In questions falling within the absolute privilege the question of malice has no place. However malicious the intent, or however false the charge may have been, the law, from considerations of public policy, and to secure the unembarrassed and efficient administration of justice, denies to the defamed party any remedy through an action for libel or slander. This privilege, however, is not a license which protects every slanderous publication or statement made in the course of judicial proceedings. It extends only to such matters as are relevant or material to the litigation, or, at least, it does not protect slanderous publications plainly irrelevant and impertinent, voluntarily made, and which the party making them could not reasonably have supposed to be relevant. *Ring v. Wheeler*, 7 Cow. 725; *Hastings v. Lusk*, 22 Wend. 410, 34 Am. Dec. 330; *Gilbert v. People*, 1 Denio, 41, 43 Am. Dec. 646; *Grover, J., Marsh v. Ellsworth*, 50 N. Y. 309; *Rice v. Coolidge*, 121 Mass. 393, 23 Am. Rep. 279; *McLaughlin v. Cowley*, 127 Mass. 316. Where there are several distinct charges, some privileged and some not privileged, those not privileged are not justified by the charges that are privileged. *Clarke v. Roe*, 4 Ir. C. L. 1; *Tuson v. Evans*, 12 Adol. & El. 733; *Warren v. Warren*, 1 Crompt. M. & R. 250. The policy upon which the doctrine of privilege rests does not call for an extension of the privilege to such cases. The public interests are sufficiently protected when the privilege is limited to communications which fairly ought to have been made, or, in case of judicial proceedings, to matters not wholly outside of the cause. But no strained or close construction will be indulged to exempt a case from the protection of privilege.

Both occasions on which the publication in this case was made were privileged; that is to say, it was the right of the sureties to receive, and it was the reasonable duty of the defendants to give, all proper information bearing upon the claim made by the bank against the sureties. The occasion, therefore, justified the bank in disclosing the facts relating to the alleged defalcation of the cashier, and even if the bank was misinformed, and there had been no defalcation in fact, such information was privileged, and the cashier could have maintained no action, unless perhaps in respect to the first publication on proof of actual malice. But the incorporation into the publication of the statement that the teller acted in collusion with the cashier was, so far as appears, wholly irrelevant, and unnecessary. The teller was not a party to the bond or to the suit. There was no issue which called for an investigation of the teller's conduct. The information that the teller had been in complicity with the cashier was not in response to any inquiry made by the defendant. The information did not on its face explain, or tend to explain, or establish any fact relevant to the defendant's case against the sureties, nor can it be seen how knowledge of the fact communicated would be

of advantage to the sureties. If, upon any ground, the information was relevant or material, as no such ground appears on the face of the publication, we are not at liberty to assume its existence. The burden of showing its relevancy, under the circumstances, was upon the defendants. It is not impossible that a narration on the trial of the facts as to the defalcation of the cashier might incidentally involve a disclosure of the acts of the teller, but this did not, we think, justify the defendants in the publication, in advance of the defamatory matter as to the teller, not, so far as appears, having any relevancy to the liability of the sureties on their bond. *Prima facie* the publication was not privileged. The ordinary consequence follows that malice is presumed from the defamatory nature of the publication, and the defendants must rely for their defense upon a justification (which was not attempted) or upon proof in mitigation of damages. The cases of *Klinck v. Colby*, 46 N. Y. 427, 7 Am. Rep. 360, and *Marsh v. Ellsworth*, 50 N. Y. 309, are not inconsistent with the conclusion we have reached. Both cases recognize the rule that the question of privilege depends upon there being a lawful occasion for speaking and the use of words pertinent to that occasion. The conclusion reached requires a reversal of the judgments at the circuit and general term, and a direction for a new trial. Judgments reversed.

RUGER, C. J., and FINCH, PECKHAM, and GRAY, JJ., concurred. EARL and O'BRIEN, JJ., dissented.

(For other valuable cases as to "judicial proceedings," see *Wright v. Lothrop*, 149 Mass. 385, 21 N. E. 963; *Blakeslee v. Carroll*, 64 Conn. 223, 29 Atl. 473, 25 L. R. A. 106; *Cooley v. Galyon*, 109 Tenn. 1, 70 S. W. 607, 60 L. R. A. 139; *Clemmons v. Danforth*, 67 Vt. 617, 32 Atl. 626, 48 Am. St. Rep. 836; *McGehee v. Insurance Co.*, 112 Fed. 853, 50 C. C. A. 551; *Jones v. Brownlee*, 161 Mo. 258, 61 S. W. 795, 53 L. R. A. 445; *Hollis v. Meux*, 69 Cal. 625, 11 Pac. 248, 58 Am. Rep. 574; *Barnes v. McCrate*, 32 Me. 442; *Liles v. Gaster*, 42 Ohio St. 631; *Dawkins v. Lord Rokeby*, L. R. 7 H. L. 744. In England the privilege is broader than in America, and applies to defamatory matter which is not relevant to the issue. *Munster v. Lamb*, 11 Q. B. D. 588.

The absolute privilege also applies to "legislative proceedings," and embraces words spoken by members of parliament, or of congress, or of the state legislatures, in the discharge of their official duties in the house, reports made by legislative committees, etc. *Hastings v. Lusk*, 22 Wend. 410, 417, 34 Am. Dec. 330; *Coffin v. Coffin*, 4 Mass. 1, 3 Am. Dec. 189.)

## VII. CONSTRUCTION OF WORDS—COLLOQUIUM—INNUEUDO.

(59 Pa. 488.)

STITZELL v. REYNOLDS et ux. (in part).

(Supreme Court of Pennsylvania. January 5, 1869.)

### 1. SLANDER—WORDS ACTIONABLE.

Words spoken of plaintiff, that she had her hogs in another person's corn, and carried corn away, impute no indictable offense, and without special damage are not actionable.

### 2. SAME—PLEADING.

To show that such words were meant to impute larceny, extrinsic circumstances must be alleged by proper averments, with a colloquium. Distinctions stated and explained between "averment," "colloquium," and "innuendo." When the use of these in pleading is necessary in actions for libel or slander.

Error to the Court of Common Pleas of Fayette County; of October and November term, 1868, No. 41.

This was an action of slander by Patrick Reynolds and Elizabeth, his wife, against Frederick Stitzell, commenced August 23, 1866.

The first count of the declaration charged that the defendant uttered the following defamatory words, to wit: "That he (the said Frederick Stitzell meaning) understood that Elizabeth Reynolds (the plaintiff meaning) had her hogs in his (the said George Dawson's meaning) corn, and that she (the said Elizabeth Reynolds meaning) had carried away corn, thereby meaning and intending the said Elizabeth Reynolds to have been guilty of larceny."

The court, denying a motion by the defendant in arrest of judgment on the ground that the words were not actionable, entered judgment for the plaintiff upon a verdict found by the jury for \$320. The defendant took out a writ of error.

SHARSWOOD, J. The words set out in the first count of the declaration impute no indictable offense of themselves, and, without special damage, are therefore not actionable. Words, indeed, are no longer construed in mitiori sensu, but if in their plain popular meaning they convey a criminal charge it is now sufficient. "Elizabeth Reynolds had her hogs in your corn and carried corn away," impute, in their worst sense, standing by themselves, a mere trespass. To show that they meant to impute larceny, there must be a reference to some extrinsic circumstances, and these extrinsic circumstances must be spread on the record by proper averments, with a colloquium. "A word," said Gibson, C. J., in *Deford v. Miller*, 3 Pen. & W. 105, "which does not necessarily import criminality is in pleading rendered actionable only by reference to extrinsic facts which show it to have

been used in an obnoxious sense. Thus the word 'forsworn' becomes actionable when shown to have been predicated of one who had given testimony under the sanction of a judicial oath; and hence the necessity of a colloquium about the time, place, and circumstances."

Perhaps the best illustration of the rule of pleading in these cases is to be found in *Barham's Case*, 4 Rep. 20. The words, as laid, were, "Barham burnt my barn;" (innuendo)—a barn with corn. The action was held not to lie, because burning a barn, unless it had corn in it, was not felony; but, remarked De Gray, C. J., on this case in *Rex v. Horne*, Cowp. 684: "If in the introduction it had been averred that the defendant had a barn full of corn, and that in a discussion about that barn the defendant had spoken the words charged, an innuendo of its being the barn full of corn would have been good." Here the extrinsic fact that the defendant had a barn full of corn is the averment. The allegation that the words were uttered in a conversation in reference to that barn is the colloquium, and the explanation given to the words thus spoken is the innuendo. *Van Vechten v. Hopkins*, 5 Johns. 221, 4 Am. Dec. 339.

"Nothing can be more clear," said Lord Ellenborough in *Hawkes v. Hawkey*, 8 East, 431, "than the rule laid down in the books, and that which has been constantly adopted in practice, not only when the words spoken do not in themselves naturally convey the meaning imputed by the innuendo, but also where they are ambiguous and equivocal, and require explanation by reference to some extrinsic matter to make them actionable; it must not only be predicated that such matter existed, but also that the words were spoken of and concerning that matter." An innuendo, as has been often decided, cannot add to or enlarge, extend, or change the sense of the previous words, and the matter to which it refers must always appear from the antecedent parts of the declaration. *Thomas v. Croswell*, 7 Johns. 271, 5 Am. Dec. 269. It cannot supply the place of a colloquium. *Lindsey v. Smith*, 7 Johns. 359. "It would not be easy," says Mr. Starkie, "or perhaps possible, to point out a more clear and convenient process for technically stating a case upon the record than this, which has with great wisdom been adopted by the law from very early times. It combines simplicity with precision, separating the law from the facts, and exhibiting a statement of the cause of action on the face of the record, plain and distinct in all its parts." *1 Starkie on Slander*, 431.

The decisions of this court have heretofore been entirely in accord with these principles. *Shultz v. Chambers*, 8 Watts, 300; *Thompson v. Lusk*, 2 Watts, 17, 26 Am. Dec. 91. Where the words themselves may be taken in a double sense, the innuendo is used in order to attach such meaning to them as the plaintiff claims was intended, or may think necessary to render the same actionable. But whenever in such case the actionable quality of the words arises from circum-

stances extrinsic of them, averments are essential to show of record that such circumstances existed, and connect the words used with these circumstances. *Gosling v. Morgan*, 32 Pa. 273. And in *Lukeheart v. Byerly*, 53 Pa. 418, it was expressly decided that words laid in a count for slander, which are not actionable in themselves and have no colloquium to connect them with extrinsic circumstances, are not helped by the innuendo of larceny.

The only difficulty has been in applying the rule in determining when the words used do, in their popular sense, convey the imputation of a criminal charge, either singly or in one of two senses; for then an innuendo is all that is necessary to fix the meaning, or, if not absolutely necessary, may nevertheless be used without danger.

In *Bricker v. Potts*, 12 Pa. 200, it was held that words which in their ordinary import imply a false oath in a judicial proceeding are actionable, although in fact there was no such proceeding, and therefore no colloquium is necessary. *Dottarer v. Bushey*, 16 Pa. 204, belongs to the same class. "If the words charged in a narr. for slander do not imply a criminal charge subject to infamous punishment, neither an innuendo nor a verdict will help them." *Vanderlip v. Roe*, 23 Pa. 82. If the slanderous words alleged to have been spoken contain a charge of fornication, no colloquium is necessary. "If the words laid do not of themselves involve the charge, or express the meaning repeated in the innuendo, then the colloquium is the place to insert the other facts, which give the color to the words laid, and without it there would be no cause of action."

These are decisions that I have found bearing on this question, and I think it will be admitted that they have steered skillfully and successfully through these narrows of pleading. Now, in the words as laid in the first count of the declaration before us, there was no fault or blame or concealment alleged—merely carrying away, without even the ingredient *invito domino*. In the popular sense, and certainly in the legal sense, there was nothing imputed by the words themselves but a trespass, if even that.

It follows that the first count of the declaration was bad. Judgment reversed.

(Other interesting cases are *Harrison v. Manship*, 120 Ind. 43, 22 N. E. 87 [here the words were, "He took and drove off my ducks and sold them"]; *Carter v. Andrews*, 16 Pick. 1 ["the library has been plundered by C., the plaintiff"]; *Snell v. Snow*, 13 Mete. 278, 46 Am. Dec. 730 [plaintiff was called a "bad girl"]; *Riddell v. Thayer*, 127 Mass. 487; *Brettun v. Anthony*, 103 Mass. 37; *Henmens v. Nelson*, 138 N. Y. 517, 34 N. E. 342, 20 L. R. A. 440 ["she entertained gentlemen company at all hours of the night"]; *Kinney v. Nash*, 3 N. Y. 177; *Sturtevant v. Root*, 27 N. H. 69; *Patterson v. Wilkinson*, 55 Me. 42, 92 Am. Dec. 568; *McLaughlin v. Fisher*, 136 Ill. 111, 24 N. E. 60; *Smedley v. Soule*, 125 Mich. 192, 84 N. W. 63; *State v. Elliot*, 10 Kan. App. 69, 61 Pac. 981. "The purpose of an innuendo," it is said, "is to define the defamatory meaning which the plaintiff attaches to the words, to show how they come to have that meaning, and how they relate to the plaintiff. But it

cannot be used to introduce new matter, or to enlarge the natural meaning of the words, and thereby give to the language a construction which it will not bear." *Naulty v. Bulletin Co.*, 206 Pa. 128, 55 Atl. 862; *Mattice v. Wilcox*, 147 N. Y. 624, 42 N. E. 270; *Benton v. State*, 59 N. J. Law, 551, 36 Atl. 1041; *Kilgour v. Eve. Star Newspaper Co.*, 96 Md. 16, 53 Atl. 716; *Williams v. Fuller* [Neb.] 94 N. W. 118; *State v. Shippman*, 83 Minn. 441, 86 N. W. 431.

By statute, in New York and a number of the states, when defamatory matter is ambiguous as to who is defamed by it, it is not necessary to allege in the complaint any extrinsic fact, to show the application of such matter to the plaintiff, but the plaintiff may state generally that "it was published or spoken concerning him; and if that allegation be controverted, the plaintiff must establish it on the trial." N. Y. Code Civ. Proc. § 535; *Corr v. Sun Printing Ass'n*, 177 N. Y. 131, 69 N. E. 288; *Petsch v. St. Paul Dispatch Printing Co.*, 40 Minn. 291, 41 N. W. 1034; 18 Am. & Eng. Encyc. of Law [2d Ed.] 994. By the common-law rule, the extrinsic facts must be alleged. *Miller v. Maxwell*, 16 Wend. 9; *Croswell v. Weed*, 25 Wend. 621; *Hanna v. Singer*, 97 Me. 128, 53 Atl. 991.)

## VIII. SLANDER OF TITLE; SLANDER OF PROPERTY.

(5 N. Y. 14.)

KENDALL v. STONE (In part).

(Court of Appeals of New York. July, 1851.)

### 1. SLANDER OF TITLE—PECUNIARY INJURY.

To maintain an action for slander of title, the words must not only be false, but must be uttered maliciously, and be followed as a natural and legal consequence by pecuniary damage to plaintiff, which must be specially alleged and proved.

### 2. SAME.

By statements made by defendant as to plaintiff's title to a lot of land, a third person, who had entered into a written contract with plaintiff for the purchase of it, was induced to desire to withdraw from his agreement, to which plaintiff assented, and the contract was rescinded. *Held*, that plaintiff's loss of the sale was not the legal consequence of the words spoken by defendant, and plaintiff could not recover damages from him therefor.

Appeal from Superior Court of the City of New York, General Term.

Action for slander of title. Defendant appealed from a judgment for plaintiff, and from an order denying a motion for a new trial made on a bill of exceptions.

GARDINER, J. The cause of action in this case is denominated "slander of title" by a figure of speech, in which the title to land is personified, and made subject to many of the rules applicable to personal slander, when the words in themselves are not actionable. To

maintain the action, the words must not only be false, but they must be uttered maliciously, (*Smith v. Spooner*, 3 Taunt. 254; *Pater v. Baker*, 3 Man. G. & S. 868,) and be followed, as a natural and legal consequence, by a pecuniary damage to the plaintiff, which must be specially alleged in the declaration, and substantially proved on the trial, (*Beach v. Ranney*, 2 Hill, 314; *Crain v. Petrie*, 6 Hill, 524, 41 Am. Dec. 765.) The declaration in this case alleges, in the only count to which the evidence applies, that by means of the grievances divers good citizens, and especially one Asa H. Wheeler, were deterred from purchasing the lands in question, and the plaintiff was prevented from disposing of the same, and thereby deprived of the advantages to be derived from the sale thereof, etc. The loss of a sale to Wheeler is therefore the only special damage incurred by the plaintiff alleged in the declaration and established by the evidence. The superior court places the recovery upon this ground, and it is obviously the only one on which it can be sustained. Before the words were spoken the plaintiff and Wheeler had entered into an agreement in writing for the sale of the lot in question, which was executed by the vendor, and accepted by the vendee, who upon its delivery paid \$250 towards the purchase money. The agreement was obligatory upon both parties. Either could have enforced a specific performance in equity, and thereby attained the precise result contemplated by the contract. Under these circumstances, the representations charged were made by the defendant. The effect of them was not to prevent a sale of the land, for that had been secured by the existing contract. Wheeler was induced by the misrepresentation to desire a relinquishment of the agreement. This was assented to by the plaintiff, the agreement was rescinded, and the note of the vendor received for the amount of the money advanced by the purchaser. This suit was then instituted, and special damages claimed of the defendant, substantially for the non-fulfillment of a contract which had been surrendered by the consent and agreement of the plaintiff. This is a brief statement of the proceeding.

The court charged "that it was pretty manifest, from the testimony of Wheeler, that the plaintiff had sustained damages; that the former would have taken the title, if it had not been for the words spoken by the defendant." To this there was an exception, and the question is whether the special damage alleged by the plaintiff, which is the gist of the action, was established by this evidence.

There is no case that holds that, where the special damage consists in the violation of a contract, the plaintiff may discharge the obligation, and then recover damages in an action of tort for its non-performance. The right claimed to be affected by the slander originated in and subsisted by virtue of the contract. When that was discharged, it fell with it. The vendor and vendee elected to consider the agreement as null from the beginning. When the suit was insti-

tuted, therefore, there could be no injury, for there was no right to be affected. Yet, under these circumstances, the plaintiff has been permitted to recover a thousand dollars by way of damages, because Wheeler wished to be discharged from a purchase of a lot, the stipulated value of which was \$900, and was discharged by the vendor accordingly. In *Bird v. Randall*, 3 Burrows, 1345, the action was for enticing a servant from the employment of the plaintiff. The servant was bound to the master for five years, under a penalty of £100. The plaintiff sued the servant, and recovered judgment, which was paid after the suit against the defendant was at issue and noticed for trial. It was held that the defendant was discharged. The recovery against the servant by him, and payment, put an end to the contract, as Lord Mansfield remarks, and in his reasoning he puts a satisfaction upon the same ground as a release or discharge of the contract. The judgment must be reversed.

Judgment reversed, and new trial ordered.

(See also *Like v. McKinstry*, 3 Abb. Dec. 62; *Andrew v. Deshler*, 45 N. J. Law, 167; *Wren v. Weild*, L. R. 4 Q. B. 730. In *Burkett v. Griffith*, 90 Cal. 532, 27 Pac. 527, 13 L. R. A. 707, 25 Am. St. Rep. 151, the nature of this action is thus explained: "Although the term 'slander' is more appropriate to the defamation of the character of an individual, yet the term 'slander of title' has by use become a recognized phrase of the law; and an action therefore is permitted against one who falsely and maliciously disparages the title of another to property, whether real or personal, and thereby causes him some special pecuniary loss or damage. In order to maintain the action, it is necessary to establish that the words spoken were false, and were maliciously spoken by the defendant, and also that the plaintiff has sustained some special pecuniary damage as the direct and natural result of their having been so spoken." This case was for slander of title to realty. Other similar cases are *Malachy v. Soper*, 3 Bing. N. C. 371; *Linden v. Graham*, 1 Duer, 670; *Cornwell v. Parke*, 52 Hun, 596, 5 N. Y. Supp. 905, affirmed in 123 N. Y. 657, 25 N. E. 955; *Paull v. Halferty*, 63 Pa. 46, 3 Am. Rep. 518; *Chesebro v. Powers*, 78 Mich. 472, 44 N. W. 290. Cases of slander of title to personality are *Stevenson v. Love* [C. C.] 106 Fed. 466; *Like v. McKinstry*, 41 Barb. 186, 3 Abb. Dec. 62; *Andrew v. Deshler*, 45 N. J. Law, 167 [title to a patent]. The name "slander of title" applies not only to oral statements, but also to those made in writing. *Paull v. Halferty*, *Chesebro v. Powers*, *Andrew v. Deshler*, *supra*.)

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(35 Minn. 471, 29 N. W. 68, 59 Am. Rep. 335.)

#### WILSON v. DUBOIS.

(Supreme Court of Minnesota. July 20, 1886.)

#### 1. SLANDER OF PROPERTY—MALICIOUS DISPARAGEMENT OF PROPERTY.

False and malicious statements disparaging an article of property, when followed, as a natural, reasonable, and proximate result, by special damage to the owner, are actionable.

#### 2. SAME—SPECIAL DAMAGE—LOSS OF SALE.

Special damage is of the gist of the action; and, where the special damage relied on is loss of sale of the thing disparaged, it is indispensable

to allege and show loss of sale to some particular person, and, in the absence of such allegation, the complaint is demurrable for failure to state a cause of action.

Appeal from an Order of the District Court, Hennepin County, Sustaining Defendant's Demurrer to Plaintiff's Complaint.

BERRY, J. The complaint alleges that plaintiff, a horse-dealer, owned, January 30, 1886, and still owns, a race-horse, which then was and still is for sale; that on that day defendant maliciously published in a newspaper, (of large circulation,) of which he was proprietor, a statement that the horse was 21 years old, when he was not more than 12 years old, as defendant well knew, thereby intending to hinder the sale of the horse by plaintiff, to his pecuniary loss and damage; that at said time plaintiff had "a chance to sell, and was negotiating a sale," of said horse for \$1,000, and but for said false publication would have sold him for that sum; and that, solely because of said false publication, "plaintiff lost the chance to sell said horse; the negotiations \* \* \* were broken up by said parties who contemplated purchasing; no one will pay for it more than \$500; and plaintiff cannot sell his said horse for more than \$500;" and that plaintiff has accordingly suffered damages in the sum of \$500.

False and malicious statements, disparaging an article of property, when followed, as a natural, reasonable, and proximate result, by special damage to the owner, are actionable. *Paull v. Halferty*, 63 Pa. 46, 3 Am. Rep. 518; *Gott v. Pulsifer*, 122 Mass. 235, 23 Am. Rep. 322; *Starkie, Sland.* (Wood's Ed.) 212; *Manning v. Avery*, 3 Keb. 153; *Broom, Comm.* (6th Ed.) 761, 762; *Swan v. Tappan*, 5 Cush. 104; *Western Co. v. Lawes Co.*, L. R. 9 Exch. 218; *Odgers, Sland.* § 145; *Townsh. Sland.* § 204.

Does the complaint state a case under this rule? That the statement complained of was false and malicious, is distinctly averred. It was also *prima facie* disparaging, for *prima facie*, as a matter of common knowledge, a horse at 21 years of age is less valuable than he is at 12. The complaint also alleges, in effect, that the plaintiff's loss of sale of his horse was the result of the publication; and there is no difficulty in conceiving of a state of facts showing that the intending purchaser was influenced, and led to decline or refuse to purchase, by the publication complained of, and hence no difficulty in conceiving that the failure to sell to him may have been a natural, reasonable, and proximate consequence of said publication. But the allegation of special damage is insufficient. The action is in the nature of one for slander of title, (*Western C. M. Co. v. Lawes C. M. Co.*, L. R. 9 Exch. 218,) and hence it is not the ordinary action for slander, properly so called, "but an action on the case, for special damages sustained by reason of the speaking" complained of. 1 Saund. 243e, note n; *Malachy v. Soper*, 3 Bing. N. C. 371; *Brook v. Rawl*,

4 Welsb., H. & G. 521. Special damages are therefore of the gist of the action. *Wetherell v. Clarkson*, 12 Mod. 597. Without them the action cannot be maintained, and therefore a complaint failing to allege them failed to allege a cause of action. *Starkie, Sland.* 212; *Wetherell v. Clarkson*, supra; *Cook v. Cook*, 100 Mass. 194.

Where loss of sale of a thing disparaged is claimed and relied on as special damages occasioned by the disparagement, it is indispensable to allege and show a loss of sale to some particular person, for the loss of a sale to some particular person is the special damage, and of the gist and substance of the action. 1 Roll. Abr. 58; *Manning v. Avery*, 3 Keb. 153; *Tasburgh v. Day*, Cro. Jac. 484; *Evans v. Harlow*, 5 Q. B. 624; *Tobias v. Harland*, 4 Wend. 537; *Kendall v. Stone*, 5 N. Y. 14; *Swan v. Tappan*, 5 Cush. 104; *Linden v. Graham*, 1 Duer, 670; *Hartley v. Herring*, 8 Term. R. 130; *Hallock v. Miller*, 2 Barb. 630; *Malachy v. Soper*, supra; *Ashford v. Choate*, 20 U. C. C. P. 471; 3 Suth. Dam. 674; *Stiebeling v. Lockhaus*, 21 Hun, 457; *Cramer v. Cullinane*, 2 McArthur, 197; *Bergmann v. Jones*, 94 N. Y. 51; *Bassell v. Elmore*, 48 N. Y. 563; *Cook v. Cook*, 100 Mass. 194; *Pollard v. Lyon*, 91 U. S. 225; *Odgers, Sland.* 313; *Folk. Starkie, Sland.* (Wood's Ed.) § 136; *Wetherell v. Clarkson*, supra; *Swan v. Tappan*, supra; *Paull v. Halferty*, supra; *Gott v. Pulsifer*, supra; and see declarations or complaints in many of the foregoing cases, especially the two last cited.

The rule is not technical, but substantial. It imposes no hardship upon the plaintiff. If there is a person to whom a sale could have been made, in the absence of the disparagement, he can be named, so as to inform defendant of the particular charge of damage which he is required to meet. *Wetherell v. Clarkson*, supra. If there is no such person, there is no cause of action; and it follows that the failure to name the particular person or persons to whom a sale could have been effected, if it had not been prevented by the disparagement, does not present a case of mere indefiniteness, but of total absence of an allegation essential to the statement of a cause of action,—a lack of substance, not of form, (*Cook v. Cook*, supra; *Pollard v. Lyon*, supra;) and therefore a case for a demurrer, rather than for a motion to make more definite and certain. *Pom. Rem.* § 549.

Order sustaining demurrer approved, and case remanded for further proceedings.

(For another case of disparagement of goods, see *Gott v. Pulsifer*, 122 Mass 235, 23 Am. Rep. 322, also ante, p. 69. See also *Boynton v. Shaw Stocking Co.* 146 Mass. 219, 15 N. E. 507; *Tobias v. Harland*, 4 Wend. 537; *Le Massena v. Storm*, 62 App. Div. 150, 70 N. Y. Supp. 882, and cases cited. The doctrine applies to written statements as well as to those that are spoken. *Id.* No action will lie unless special damage is proved. *Id.*; *White v. Mellin* [1895] A. C. 154; *Marlin Fire Arms Co. v. Shields*, 171 N. Y. 384, 64 N. E. 163, 59 L. R. A. 310. If the disparagement of another dealer's wares be simply "puffing" or declaring the superiority of one's own, this will not be actionable,

even though the statement be untrue and occasion damage. *Hubbuck v. Wilkinson* [1899] 1 Q. B. 86; *Nonpareil Cork Mfg. Co. v. Keasbey & Mattison Co.* [C. C.] 108 Fed. 721.

Similar rules apply to a libel or slander on one's business [*Dudley v. Briggs*, 141 Mass. 582, 6 N. E. 717, 55 Am. Rep. 494]; or on his place of business [*Kennedy v. Press Pub. Co.*, 41 Hun, 422]; as, e. g., where a newspaper published that a man's boarding house and restaurant was a resort for anarchists [*Bosi v. New York Herald Co.*, 33 Misc. Rep. 622, 68 N. Y. Supp. 898; *Id.*, 58 App. Div. 619, 68 N. Y. Supp. 1134].

In *Dooling v. Budget Pub. Co.*, 144 Mass. 258, 10 N. E. 809, 59 Am. Rep. 83, defendant published of a dinner furnished by a caterer that it was "wretched," that it was served "in such a way that hungry barbarians might justly object," and that "the cigars were simply vile, and the wines not much better." *Held*, not actionable without proof of special damage.)

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## TRESPASS TO LAND.

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### I. WHAT CONSTITUTES A TRESPASS.

(74 Me. 163.)

*HATCH v. DONNELL*

(Supreme Judicial Court of Maine. November 17, 1882.)

#### TRESPASS TO LAND—WHAT CONSTITUTES.

An entry upon the land of another, without any permission, express or implied, constitutes a trespass, for which damages are recoverable, though merely nominal.

On report.

Action of trespass *quare clausum fregit*. The parties were adjoining owners, the dividing line being in dispute. The declaration alleged two acts of trespass,—one in 1880, when defendant drove his horse and plow over plaintiff's lands, and one in 1881, when defendant cultivated the land in dispute.

**APPLETON, C. J.** This is an action of trespass for breaking and entering the plaintiff's close. The lots of the plaintiff and defendant are adjacent. The defendant, when plowing his land, brought his horse and plow on the plaintiff's land, treading down her grass and knocking off bark from her trees. This is the trespass complained of. The defendant had no right of entry upon the plaintiff's land. His entry was a trespass. Permission was not asked, nor license given. The plaintiff in no way consented and the defendant never asked

consent. The parties rely on their strict legal rights, neither asking of nor giving any favor to the other. The relation of the parties—the sedulous care of each to preserve existing rights—negatives the idea of implied, equally as of express, permission or license. In *Harmon v. Harmon*, 61 Me. 222, and in *Lakin v. Ames*, 10 Cush. 198, there was the fact of relationship between the parties, from which, with the other circumstances, license was inferred. Here there was no such fact. No friendly relations were existing between the parties. Their attitude was mutually adverse. The damages are merely nominal.

Judgment for plaintiff for one dollar.

BARROWS, DANFORTH, VIRGIN, PETERS, and SYMONDS, JJ., concurred.

(The following acts have been held to be trespasses to land: Extending one's arm over a fence dividing his land from that of his neighbor [*Hannabalsen v. Sessions*, 116 Iowa, 457, 90 N. W. 93, 93 Am. St. Rep. 250]; projecting the eaves of one's barn over the neighbor's close [*Smith v. Smith*, 110 Mass. 302]; setting up telegraph poles on one's land, without his consent [*Board of Trade Telegraph Co. v. Barnett*, 107 Ill. 507, 47 Am. Rep. 453]; cutting down telegraph poles standing in the highway [*American Union Telegraph Co. v. Middleton*, 80 N. Y. 408]; casting material on another's land, though without negligence [*Mairs v. Real Estate Ass'n*, 89 N. Y. 498]; fox hunting over another's land without his consent [*Paul v. Summerhays*, 4 Q. B. D. 9]. All persons who encourage or incite, by words or deeds, the commission of a trespass, are liable therefor. *Brown v. Perkins*, 1 Allen, 89.)

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(12 Wend. 98.)

GIDNEY v. EARL (in part).

(Supreme Court of New York. May, 1834.)

**TRESPASS—APPROPRIATION OF SOIL OF HIGHWAY—RIGHT OF ADJOINING LAND-OWNER.**

For an appropriation of the soil of a public highway, trespass lies by the owner of the land through which the highway passes.

Error from the Saratoga common pleas. *Gidney* sued *Earl* in a justice's court in an action of trespass for digging up and removing the soil from a highway passing through the land of the plaintiff. It was admitted that the plaintiff owned and occupied the land opposite to which the soil was taken, on both sides of the road, except a burying ground on the south side of the road. The soil was taken from the north side of the road and deposited in the defendant's garden. It was objected by the defendant that the fact of the plaintiff owning the lands opposite the highway did not prove title in him to the highway, nor possession, so as to enable him to maintain trespass against

the defendant. The objection was sustained by the justice, who rendered judgment against the plaintiff for costs. The plaintiff sued out a certiorari, and the common pleas of Saratoga affirmed the judgment of the justice. The plaintiff thereupon sued out a writ of error.

NELSON, J. The public highways in this state were generally laid out and opened according to the provisions of some statute law existing at the time. Prescription or use of 20 years or more of a road gives to the public a right to the enjoyment of it for that purpose in some cases. The right of way, public or private, is but an incorporeal hereditament—an easement which, per se, does not divest the owner of the fee of the land; and for every other purpose except the use or servitude as a public highway the soil belongs to him, and he is entitled to the same remedies for an injury to this residuary interest that he would be entitled to if it was entire and absolute.

When, therefore, a road runs through a man's close, prima facie the fee of the land over which the road passes belongs to him as much as it does in any other part of the lot or tract. The law will not presume a grant of a greater interest or estate than is essential to the enjoyment of the public easement; the rest is parcel of the close. The fact that the highway is fenced on each side is for the convenience of the owner, and has no necessary connection with the road.

It follows, from the above view, that the person in possession of the farm or lot through which the highway passes is, in contemplation of law, in possession of the highway, subject to the public easement; for, being in possession of the lot, he is prima facie in possession of every parcel of it. This principle is recognized by the court in *Cortelyou v. Van Brunt*, 2 Johns. R. 363, where it is said the general rule here is that the fee of the highway belongs to the owner of the adjoining ground, and that the sovereign has only a right of passage. It is but a servitude or easement, and trespass will lie for any exclusive appropriation of the soil.

Judgment reversed.

(It is the general common law rule that the owners of land on each side of a public highway own to the centre of the road, subject to the public right of passage. "They may maintain an action of trespass against any person who digs up the soil of it, or cuts down any trees growing on the side of the road, and left there for shade or ornament. They may carry water in pipes under the highway, and have every use and remedy that is consistent with the servitude or easement of a way over it and with police regulations." 3 Kent's Comm. 432. See also *Bloomfield & R. Gaslight Co. v. Calkins*, 62 N. Y. 386; *Hunt v. Rich*, 38 Me. 195; *Hickman v. Maisey* [1900] 1 Q. B. 752; *Harrison v. Duke of Rutland* [1893] 1 Q. B. 142.)

(9 Barb. 652.)

## NEWKIRK v. SABLER.

(Supreme Court of New York. December 2, 1850.)

## TRESPASS TO LAND—ENTRY TO TAKE AWAY PROPERTY—REPELLING BY FORCE.

Plaintiff, having been forbidden to cross defendant's lands, sent his servant with a team across them. On the servant's return to the bars where he had entered, he found them nailed up; whereupon he left the team on defendant's land, and went and informed plaintiff, who came and commenced tearing down the fence, in order to take away his team, and, persisting in his attempt, after being forbidden by defendant, a fight ensued, and plaintiff was injured. *Held*, that plaintiff had no right to enter upon defendant's land to take away his property without the express or implied consent of defendant, and that defendant had the right to protect his possession and property by force, and was not liable unless the force used was greater than necessary for such purpose.

## Appeal from Circuit Court, Ulster County.

Action for assault and battery. At the trial it appeared that, after defendant had forbidden plaintiff crossing his farm lands, plaintiff sent his servant with a team across such lands. The servant entered by taking down bars, which, on his return, he found defendant had nailed up. After an ineffectual attempt to get through, he left the team on defendant's lands, and went after plaintiff, who came and commenced tearing down the fence to take away his team; and, refusing to desist on defendant's demand, a fight ensued, but plaintiff succeeded in getting down the fence and taking his team away. For the injuries to plaintiff in the fight he brought this action. The judge charged the jury that plaintiff had the right to take his team away, even though wrongfully on the premises, and if he did no more damage than necessary for that purpose defendant was not justified in using force, and that the real question was as to whether plaintiff was at the time engaged in wanton and unnecessary destruction of the defendant's fences; to which charge defendant excepted. The jury found a verdict for plaintiff for \$50. From the judgment for plaintiff entered on the verdict, defendant appealed.

PARKER, J. I think the learned justice erred in holding that the plaintiff had a right to enter upon the lands of the defendant for the purpose of regaining possession of his property. The right to land is exclusive; and every entry thereon, without the owner's leave, or the license or authority of law, is a trespass. 3 Bl. Comm. 209; *Percival v. Hickey*, 18 Johns. 285, 9 Am. Dec. 210. There is a variety of cases where an authority to enter is given by law; as, to execute legal process; to distrain for rent; to a landlord or reversioner, to see that his tenant does not commit waste, and keeps the premises in repair according to his covenant or promise; to a creditor, to demand money

payable there; or to a person entering an inn, for the purpose of getting refreshment there. 3 Bl. Comm. 212; 1 Cow. Treat. 411. In some cases, a license will be implied; as, if a man makes a lease, reserving the trees, he has a right to enter and show them to the purchaser. *Lampet v. Starkey*, 10 Coke, 46. Where the owner of the soil sells the chattels being on his land; as, if he sell a tree, a crop, a horse, or a fanning-mill, which remain within his close, he at the same time passes to the vendee, as incident to such sale, a right to go upon the premises, and take away the subject of his purchase, without being adjudged a trespasser. 1 Cow. Treat. 367; Bac. Abr. "Trespass," F; *Winterbourne v. Morgan*, 11 East, 396; 2 Rolle, Abr. 567, m. n. 1. And if a man in virtue of his license erects a building on another's land, this license cannot be revoked so entirely as to make the person who erected it a trespasser for entering and removing it after the revocation. In some cases the motive will excuse the entry. If J. S. goes into the close of J. N. to succor the beast of J. N., the life of which is in danger, an action of trespass will not lie; because as the loss of J. N., if the beast had died, would have been irremediable, the doing of this is lawful. But if J. S. go into the close of J. N. to prevent the beast of J. N. from being stolen, or to prevent his corn from being consumed by hogs, or spoiled, the action of trespass lies; for the loss, if either of those things had happened, would not have been irremediable. Bac. Abr. "Trespass," F. And if a stranger chase the beast of A, which is damage-feasant therein, out of the close of B, trespass will lie; for by doing this, although it seems to be for his benefit, B is deprived of his right to distrain the beast. *Brooke*, Abr. "Trespass," pl. 421; *Keilw.* 46.

In some cases, the entry will be excused by necessity; as, if a public highway is impassable, a traveler may go over the adjoining land. *Absor v. French*, 2 Show. 28; *Asser v. Finch*, 2 Lev. 234; *Young v. —*, 1 Ld. Raym. 725. But this would not extend to a private way; for it is the owner's fault if he does not keep it in repair. *Taylor v. Whitehead*, 2 Doug. 747; *Pomfret v. Ricroft*, 1 Saund. 321. So if a man who is assaulted, and in danger of his life, run through the close of another, trespass will not lie, because it is necessary for the preservation of his life. Y. B. 37 Hen. VI. 37, pl. 26. If my tree be blown down, and fall on the land of my neighbor, I may go on and take it away. *Brooke*, Abr. "Trespass," pl. 213. And the same rule prevails where fruit falls on the land of another. *Miller v. Fawdry*, Latch, 120. But if the owner of a tree cut the loppings so that they fall on another's land, he cannot be excused for entering to take them away, on the ground of necessity, because he might have prevented it. Bac. Abr. "Trespass," F.

Sometimes the right of action depends on the question, which is the first wrongdoer? If J. S. have driven the beast of J. N. into the close of J. S., or if it have been driven therein by a stranger, with

the consent of J. S., and J. N. go thereinto and take it away, trespass will not lie, because J. S. was himself the first wrong-doer. 2 Rolle, Abr. 566, pl. 9; *Chapman v. Thumblethorp*, Cro. Eliz. 329. Tested by that rule, the plaintiff in this suit certainly has no right of action; for he was the first wrong-doer. But it is well settled that where there is neither an express nor an implied license, nor any such legal excuse as is above stated, a man has no right to enter upon the land of another for the purpose of taking away a chattel being there, which belongs to the former. The mere fact that the plaintiff owns the chattel gives him no authority to go upon the land of another to get it. In *Heermance v. Vernoy*, 6 Johns. 5, where A has entered upon the land of B without his permission, to take a chattel belonging to A, it was held to be a trespass. So in *Blake v. Jerome*, 14 Johns. 406, a mare and colt were taken out of the plaintiff's field, by a person who acted under the orders and directions of the defendant, after they had been demanded by the defendant and refused to be delivered to him, and after he had been expressly forbidden to take them; and the defendant was held to be guilty of a trespass.

In this case, the plaintiff's horses and wagon were on the lands of the defendant, where they had been left by the servant of the plaintiff. They were not there by the defendant's permission. On the contrary, the plaintiff had been guilty of a trespass in sending his team across the lands of the defendant after he had been forbidden to do so. And I think the defendant had the right to detain them before they left the premises, and to distrain them damage-feasant. 2 Rev. St. p. 427. But it is not necessary to decide whether the defendant detained the property rightfully or wrongfully.

The plaintiff attempted to enter upon the lands of the defendant and against his will, for the purpose of taking away his property. This he had no right to do, even though his property was unlawfully detained there. If the plaintiff could not regain the possession of his property peaceably, he should have resorted to his legal remedy, by which he could, after demand and refusal, have recovered the property itself or its value. He had no right to redress himself by force. 3 Bl. Comm. 4. In pursuing his object, the plaintiff tore down the defendant's fence after he had been forbidden to enter, and after he had been ordered by the defendant to desist. The defendant had a right to protect himself in the enjoyment of his possession and his property, by defending them against such aggression. *Weaver v. Bush*, 8 Term R. 78; *Gregory v. Hill*, Id. 299; *Greene v. Jones*, 1 Saund. 296, note 1; *Green v. Goddard*, 2 Salk. 641; *Turner v. Meymott*, 1 Bing. 158; 3 Bl. Comm. 5.

The defendant cannot be held liable for the injuries inflicted upon the plaintiff on the occasion in question, unless he used more force than was necessary for the defense of his possession; and it seems he did not use enough to prevent the plaintiff's effecting his forcible

entry and taking away the property. But that was a question proper to be submitted to the jury. The judgment of the circuit court must be reversed, and a new trial awarded, costs to abide the event.

(See also *Anthony v. Haney*, 8 Bing. 186; *Blades v. Higgs*, 11 H. L. C. 621; *Smith v. Hale*, 158 Mass. 178, 33 N. E. 493, 35 Am. St. Rep. 485; *McLeod v. Jones*, 105 Mass. 403, 7 Am. Rep. 539; *Crocker v. Carson*, 33 Me. 436; *Sterling v. Warden*, 51 N. H. 217, 12 Am. Rep. 80.)

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(1 N. Y. 515, 49 Am. Dec. 346.)

VAN LEUVEN v. LYKE et al.

(Court of Appeals of New York. November, 1848.)

1. TRESPASS TO LAND—DOMESTIC ANIMALS.

The owner of domestic animals, such as horses, oxen, sheep, swine, etc., is liable to an action of trespass *quare clausum fregit* if they escape from his premises and go upon the land of another, though he had no notice in fact of their having such propensity. There are other actions for injuries done by animals in which *scienter* must be proved, but this is not the case when the action is for a trespass.

2. SAME.

Plaintiff's cow and calf were killed by being bitten by defendants' sow and pigs in plaintiff's close, while the cow was in the act of calving. *Held*, that plaintiff could not recover, as he did not allege in his declaration or prove at the trial that defendants knew of such vicious propensity on the part of the sow and pigs, or that the animals were trespassing on plaintiff's close.

Error to Supreme Court.

1. Action of trespass brought in a justice's court. Plaintiff recovered judgment, which was affirmed on *certiorari* by the court of common pleas, but reversed by the supreme court on error. 4 Denio, 127. To review the judgment of the supreme court plaintiff brought error.

JEWETT, C. J. It is alleged in the plaintiff's declaration "that on the 27th day of November, 1844, at" etc., "the defendants were the owners of a certain sow and pigs, which sow and pigs, to-wit, on the day and year aforesaid, to-wit, at the place aforesaid, bit, damaged, and mutilated and mangled a certain cow and calf of the plaintiff, while the said cow was in the act of calving, so that said cow and calf both died, to the plaintiff's damage \$50;" to which the defendants pleaded the general issue. There was evidence given on the trial sufficient to warrant the jury in finding that the plaintiff's cow and calf were destroyed by the defendants' sow and pigs in the manner set forth in the declaration, upon the land of the plaintiff, where the sow and pigs were at the time of committing the said in-

jury. But there is no allegation in the declaration, or evidence given on the trial, that swine possess natural propensities which lead them, instinctively, to attack or destroy animals in the condition of plaintiff's cow and calf. Nor is there any allegation or evidence that the defendants previously knew, or had notice, that their swine were accustomed to do such or similar mischief, or that the swine broke and entered the plaintiff's close, and there committed the mischief complained of.

It is a well-settled principle that, in all cases where an action of trespass or case is brought for mischief done to the person or personal property of another by animals *mansuetæ naturæ*, such as horses, oxen, cows, sheep, swine, and the like, the owner must be shown to have had notice of their viciousness before he can be charged, because such animals are not by nature fierce or dangerous, and such notice must be alleged in the declaration; but as to animals *feræ naturæ*, such as lions, tigers, and the like, the person who keeps them is liable for any damage they may do, without notice, on the ground that by nature such animals are fierce and dangerous. 9 Bac. Abr. tit. "Trespass," I-505, 506; *Jenkins v. Turner*, 1 Ld. Raym. 109; *Mason v. Keeling*, Id. 606, 12 Mod. 332; *Rex v. Huggins*, 2 Ld. Raym. 1583, 1 Chit. Pl. (Ed. 1812,) 69, 70; *Vrooman v. Lawyer*, 13 Johns. 339; *Hinckley v. Emerson*, 4 Cow. 351, 15 Am. Dec. 383. But this rule does not apply where the mischief is done by such animals while committing a trespass upon the close of another.

The common law holds a man answerable, not only for his own trespass, but also for that of his domestic animals; and as it is the natural and notorious propensity of many such animals, such as horses, oxen, sheep, swine, and the like to rove, the owner is bound, at his peril, to confine them on his own land; and if they escape, and commit a trespass on the lands of another, unless through defect of fences which the latter ought to repair, the owner is liable to an action of trespass *quare clausum fregit*, though he had no notice in fact of such propensity. 3 Bl. Comm. 211; 1 Chit. Pl. 70. And where the owner of such animals does not confine them on his own land, and they escape and commit a trespass on the lands of another, without the fault of the latter, the law deems the owner himself a trespasser for having permitted his animals to break into the inclosure of the former under such circumstances; and, in declaring against the defendant in an action for such trespass, it is competent for the plaintiff to allege the breaking and entering his close by such animals of the defendant, and there committing particular mischief or injury to the person or property of the plaintiff, and, upon proof of the allegation, to recover as well for the damage for the unlawful entry as for the other injuries so alleged, by way of aggravation of the trespass, without alleging or proving that the defendant had notice that his ani-

mals had been accustomed to do such or similar mischief. The breaking and entering the close in such action is the substantive allegation, and the rest is laid as matter of aggravation only.

This principle is recognized as sound by several adjudged cases. In the case of *Beckwith v. Shordike*, 4 Burrows, 2092, the action was trespass for entering the plaintiff's close with guns and dogs, and killing his deer. The evidence showed that the defendants entered with guns and dogs, into a close of the plaintiff adjoining to his paddock, and that their dog pulled down and killed one of the plaintiff's deer. It was held to be sufficient evidence to prove the defendants trespassers, and they were held liable for the injury done by their dog, although it was not shown that they had any knowledge or notice of the propensity of the dog to do such or similar injury. In *Angus v. Radin*, 5 N. J. Law, 815, 8 Am. Dec. 626, the action was trespass for the defendant's oxen breaking into the inclosure of the plaintiff, and there goring his cow, so as to kill her; and upon the ground that the defendant had neglected to confine his oxen on his own land, and that they were trespassing on the land of the plaintiff, he was held liable for the injury done, although it was not alleged or proved that he knew or had notice of the propensity of his oxen to commit such an injury. And so in *Dolph v. Ferris*, 7 Watts & S. 367, 42 Am. Dec. 246, where the action was trespass before a justice of the peace, and there tried without any declaration having been filed. Therefore the court held that the case must be considered as if the case had been tried on the most favorable declaration for the plaintiff which the evidence would have warranted. The evidence was that the bull of the defendant, which was running at large, broke and entered into the inclosure of the plaintiff, where his horse was feeding on the grass growing therein, and gored him so that he died by reason thereof in a few days. The court held it to be clear from the evidence that the defendant might have been declared against for having broken and entered the close of the plaintiff, and the grass and herbage of the plaintiff, there lately growing, with his bull eaten up, trod down, and consumed, and might also have been charged in the same declaration with having killed or destroyed the plaintiff's horse or colt with his bull. But in the case under consideration there is no allegation charging the defendants' swine with doing any act for which the law holds the defendants accountable to the plaintiff without alleging and proving a scienter. Had the plaintiff stated in his declaration such ground of liability, or had charged that the swine broke and entered his close, and there committed the mischief complained of, and sustained his declaration by evidence, I am of opinion that he would have been entitled to recover all the damages thus sustained; but, as he has not stated in his declaration either ground of liability, the defendants ought not to be deemed to have

waived the objection by not making it specifically before the justice. I think the judgment should be affirmed.

Judgment affirmed.

(See also *Phillips v. Covell*, 79 Hun, 210, 29 N. Y. Supp. 613 [trespass by sheep]. Where a person's horse kicked and bit a mare on adjacent premises, this was held a trespass, as the horse's mouth and feet protruded through the fence over the land. *Ellis v. Loftus Iron Co.*, L. R. 10 C. P. 10.)

## II. TRESPASS IS AN INJURY TO THE POSSESSION.

(15 Ill. 558.)

HALLIGAN v. CHICAGO & R. I. R. CO.

(Supreme Court of Illinois. June Term, 1854.)

### 1. TRESPASS TO LANDS—WHO MAY MAINTAIN.

The gist of the action of trespass to lands is the injury to the possession, and he only can maintain the action who either has or is entitled to the possession. Where the land is occupied by the owner's tenant, the owner cannot maintain the action.

### 2. SAME—PLEADING—DUPLICITY.

A single trespass may be committed on several closes, and one action maintained therefor as one trespass.

Appeal from Circuit Court, La Salle County.

Action of trespass to land, brought by Patrick Halligan against the Chicago & Rock Island Railroad Company. Defendant's demurrer to the declaration was sustained, and plaintiff appealed.

TREAT, C. J. This was an action of trespass *quare clausum fregit*, brought by Halligan against the Chicago & Rock Island Railroad Company. The first three counts of the declaration alleged, in substance, that the defendant, on the 1st of January, 1853, broke and entered two closes, the property of the plaintiff, situated in the county of La Salle, and described as the west half of lot 10, in block 152, and lot 3, in block 16, in the city of Peru, and pulled down and destroyed two houses standing thereon. The fourth count alleged that the defendant, "on the day and year aforesaid, with force and arms, broke and entered the aforesaid closes of the said Patrick Halligan, and then and there ejected, expelled, put out, and amoved the said Patrick Halligan and his family and servants, and divers other persons, to-wit, Michael Pendergast and Alexander Frinkler, tenants of the said Patrick Halligan, (said tenants then and there using and occupying said premises for hire, and paying unto the said Patrick Halligan therefor at the rate of \$1,000 per annum,) from the possession, use, occupation, and enjoyment of the said premises, and kept

and continued the said Patrick Halligan and his family and servants, and also his said tenants, so ejected, expelled, put out, and amoved, for a long space of time, to-wit, from thence hitherto; whereby the said Patrick Halligan, for and during all that time, lost and was deprived of the use and benefit of the said premises, and of the rents, issues, and profits thereof, accruing to the said Patrick Halligan from said tenants, to-wit, at the county aforesaid, to the damage of the said Patrick Halligan." The defendant demurred to the declaration, and assigned, as special causes of demurrer to the fourth count, that it alleged two distinct causes of action, and showed the locus in quo to have been in the possession of other parties. The court overruled the demurrers to the three first counts, and sustained the demurrer to the fourth count. The plaintiff thereupon entered nolle prosequi as to the first three counts, and the defendant had judgment on the demurrer to the fourth count.

The question in the case is whether the fourth count shows a cause of action in the plaintiff. The first objection to the count is not tenable. An allegation of a trespass to two or more closes is allowable. A single trespass may be committed on several closes. If a party at the same time enters upon two closes belonging to another, he may be treated as guilty of but one trespass. The owner may, on a single count, recover damages commensurate with the injury. This count alleges an entry on both lots as one act, and is therefore not obnoxious to the charge of duplicity. See *Tapley v. Wainwright*, 5 Barn. & Adol. 395; *Pythian v. White*, 1 Mees. & W. 216.

To maintain trespass *quare clausum fregit*, the plaintiff must have the actual or constructive possession of the premises. The gist of the action is the injury to the possession. If the premises are occupied, the action must be brought by the party in possession; if unoccupied, by the party having the title and the right to the possession. The owner cannot maintain the action, where the land is in the occupancy of his tenant. The trespass is a disturbance of the tenant's possession, and he alone can bring the action. *Bac. Abr. "Trespass," c. 3*; 1 *Chit. Pl.* 202; *Campbell v. Arnold*, 1 *Johns.* 511; *Holmes v. Seely*, 19 *Wend.* 507; *Bartlett v. Perkins*, 13 *Me.* 87; *Rousin v. Benton*, 6 *Mo.* 592; *Davis v. Clancy*, 3 *McCord*, 422. If the trespass is prejudicial to the inheritance, the remedy of the owner is by an action on the case. He may, in that form of action, recover damages for any injury to the freehold. *Bedingsfield v. Onslow*, 3 *Lev.* 209; *Jesser v. Gifford*, 4 *Burrows*, 2141; *Lienow v. Ritchie*, 8 *Pick.* 235; *Brown v. Dinsmoor*, 3 *N. H.* 103; *Randall v. Cleaveland*, 6 *Conn.* 328; *Hall v. Snowhill*, 14 *N. J. Law*, 8.

If Pendergast and Frinkler were in the possession of the lots as the tenants of the plaintiff when the injury was committed, it is clear that they alone can maintain trespass. In such event, the entry was

an interference with their possession. The plaintiff had no possession to be invaded. For an injury to the reversion, he has an adequate remedy in another form of action. The count in question does not disclose a state of case that entitles the plaintiff to maintain the action of trespass. It shows that the lots were in the actual possession of his tenants. It alleges that his "tenants were then and there using and occupying said premises for hire, and paying unto him therefor at the rate of \$1,000 per annum." This language clearly implies a leasing of the whole of the lots, and an exclusive possession thereof by the tenants. Nor is there anything in the count that is necessarily inconsistent with the truth of this averment. It indeed alleges an expulsion of the plaintiff and his family from the lots. It may, however, be that they were temporarily on the premises as the guests of the tenants, or for some purpose consistent with an exclusive right in the tenants. If so, the injury complained of only amounted to a trespass to their persons. The count does not show such a possession in the plaintiff as authorizes him to maintain trespass *quare clausum fregit*. It ought clearly to show that he had the actual or constructive possession of the premises, or some part thereof. If the lease reserved a part of the lots, or if the plaintiff was at the time of the trespass in the exclusive possession of some portion thereof, the count should so have stated. As respects such portion, the action might be sustained. There was no occasion for the plaintiff to refer to the lease; but, having introduced it into the declaration, it was incumbent on him to show that it did not conclude him from maintaining the action.

There are some cases which hold that trespass *quare clausum fregit* may be maintained by the owner for an injury to the freehold, though the land may be in the possession of his tenant at will. *Starr v. Jackson*, 11 Mass. 519; *Hingham v. Sprague*, 15 Pick. 102; *Curtiss v. Hoyt*, 19 Conn. 154, 48 Am. Dec. 149; *Davis v. Nash*, 32 Me. 411. And it is insisted that this action may be sustained on the authority of these cases. But there is a conclusive answer to this position. It does not appear that the parties in possession were the tenants at will of the plaintiff. The precise character of the tenancy is not stated in the declaration. It is alleged that Pendergast and Frinkler were the lessees of the premises, paying rent therefor at the rate of \$1,000 per annum. The inference from this statement is that the demise was for a definite period, as a month or a year, rather than at the mere will of the lessor. In order to sustain the case on the ground indicated, it should distinctly appear that Pendergast and Frinkler were tenants at the will of the plaintiff. Intendments are not indulged to sustain a pleading. If subject to the charge of uncertainty or ambiguity, it is to be construed most strongly against the pleader. If an allegation is equivocal, and two meanings present themselves,

the one will be adopted that is most unfavorable to the party pleading.  
1 Chit. Pl. 272; Steph. Pl. 379.

The judgment is affirmed.

(To the same effect are *Galt v. Chicago & N. W. R. Co.*, 157 Ill. 125, 132, 41 N. E. 643; *Gunsolus v. Lormer*, 54 Wis. 630, 12 N. W. 62; *Bascom v. Dempsey*, 143 Mass. 409, 9 N. E. 744; *Percival v. Chase*, 182 Mass. 371, 65 N. E. 800; *Alexander v. Hard*, 64 N. Y. 228; *Zorn v. Haake*, 75 Hun, 235, 27 N. Y. Supp. 38; *Chandler v. Walker*, 21 N. H. 282, 53 Am. Dec. 202; *Burgess of New Windsor v. Stocksedale*, 95 Md. 196, 52 Atl. 596; *More v. Perry*, 61 Mo. 174.)

### III. TRESPASS AB INITIO.

(8 Coke, 146a, 1 Smith, Lead. Cas. 62.)

SIX CARPENTERS' CASE (in part).

(Court of King's Bench. Michaelmas Term, 1610.)

#### 1. TRESPASS TO LAND—AB INITIO.

The abuse of a license to enter premises given by law makes the party a trespasser ab initio; but otherwise where the license to enter was given by the person in possession.

#### 2. SAME—WHAT CONSTITUTES.

Defendants went into plaintiff's public tavern, ordered and drank wine, and then refused to pay for it. *Held*, that they were not trespassers ab initio; for the mere not doing is no trespass.

In trespass brought by John Vaux against Thomas Newman, carpenter, and five other carpenters, for breaking his house, and for an assault and battery, 1st September, 7 Jac., in London, in the parish of St. Giles extra Cripplegate, in the ward of Cripplegate, etc., and upon the new assignment, the plaintiff assigned the trespass in a house called the "Queen's Head." The defendants to all the trespass *præter fractionem domus* pleaded not guilty, and as to the breaking of the house, said that the said house *præd' tempore quo*, etc., *et diu antea et postea*, was a common wine tavern, of the said John Vaux, with a common sign at the door of the said house fixed, etc., by force whereof the defendants, *præd' tempore quo*, etc., viz., *hora quarta post meridiem* into the said house, the door thereof being open, did enter, and did there buy and drink a quart of wine, and there paid for the same, etc. The plaintiff, by way of replication, did confess that the said house was a common tavern, and that they entered into it, and bought and drank a quart of wine, and paid for it; but further said that one John Ridding, servant of the said John Vaux, at the request of the said defendants, did there then deliver them another quart of wine, and a pennyworth of bread, amounting

to 8d., and then they there did drink the said wine, and eat the bread, and upon request did refuse to pay for the same: upon which the defendants did demur in law: and the only point in this case was, if the denying to pay for the wine, or non-payment, which is all one (for every non-payment upon request, is a denying in law) makes the entry into the tavern tortious.

And, first, it was resolved when an entry, authority, or license is given to any one by the law, and he doth abuse it, he shall be a trespasser *ab initio*; but where an entry, authority, or license, is given by the party, and he abuses it, there he must be punished for his abuse, but shall not be a trespasser *ab initio*. And the reason of this difference is that in the case of a general authority or license of law, the law adjudges by the subsequent act *quo animo*, or to what intent, he entered; for *acta exteriora indicant interiora secreta*. But when the party gives an authority or license himself to do anything, he cannot, for any subsequent cause, punish that which is done by his own authority or license; and therefore the law gives authority to enter into a common inn or tavern: so to the lord to distrain; to the owner of the ground to distrain damage-feasant; to him in reversion to see if waste be done; to the commoner to enter upon the land to see his cattle, and such like. But if he who enters into the inn or tavern doth a trespass, as if he carries away anything; or if the lord who distrains for rent or the owner for damage-feasant, works or kills the distress; or if he who enters to see waste breaks the house, or stays there all night; or if the commoner cuts down a tree; in these and the like cases, the law adjudges that he entered for that purpose; and because the act which demonstrates it is a trespass, he shall be a trespasser *ab initio*.

2. It was resolved *per totam curiam*, that not doing cannot make the party who has authority or license by the law a trespasser *ab initio*, because not doing is no trespass; and therefore, if the lessor distrains for his rent, and thereupon the lessee tenders him the rent and arrears, etc., and requires his beasts again, and he will not deliver them, this not doing cannot make him a trespasser *ab initio*, and therewith agrees 33 Hen. VI. 47a. So if a man takes cattle damage-feasant, and the other offers sufficient amends, and he refuses to redeliver them, now if he sues a replevin, he shall recover damages only for the detaining of them, and not for the taking, for that was lawful; and therewith agrees Fitzh. Nat. Brev. 69g, temp. Edw. I. "Replevin," 27; 27 Eliz. 3, 88; 45 Eliz. 3, 9. So in the case at bar, for not paying for the wine, the defendants shall not be trespassers, for the denying to pay for it is no trespass, and therefore they cannot be trespassers *ab initio*.

(This famous old case has been abundantly followed in later English and American decisions. *Perry v. Bailey*, 94 Me. 50, 46 Atl. 789; *Jewell v. Ma-*

hood, 44 N. H. 474, 84 Am. Dec. 90; Ordway v. Ferrin, 3 N. H. 69; Anderson v. Cowles, 72 Conn. 335, 44 Atl. 477, 77 Am. St. Rep. 310; Dumont v. Smith, 4 Denio, 319; Leavitt v. Thompson, 52 N. Y. 62; Narehood v. Wilhelm, 69 Pa. 64; Six Carpenters' Case in Smith's Leading Cases, and note. A better reason for the distinction between a license given by law and a license given by a party is stated in Bacon's Abridgment, and approved in some American decisions. This is that "where the law has given an authority, it is reasonable that it should make void everything done by the abuse of that authority, and leave the abuser as if he had done everything without authority. But where a man who was under no necessity to give an authority, does so, and the person receiving the authority abuses it, there is no reason why the law should interpose to make void everything done by such abuse, because it was the man's folly to trust another with an authority who was not fit to be trusted therewith." Allen v. Crofoot, 5 Wend. 507; Adams v. Rivers, 11 Barb. 390. An even more satisfactory reason in regard to the license given by law is this: "That an officer or other person acting by authority of law shall not be allowed to avail himself of it as an instrument of oppression. As the citizen is bound to submit to it without resistance, and has no opportunity to make provisions or stipulations for his own security, the exercise of the legal power is made conditional upon pursuing it wholly within legal limits. The abuse is held to be a forfeiture of the whole protection which the law gives to the act which is allowed." Esty v. Wilmot, 15 Gray, 168. The rule is most commonly applied, it is said, in cases of trespass to real estate where the original entry could not be resisted, being independent of the will or consent of the owner, and also in the case of officers serving legal process. *Id.*

The third branch of the rule in the Six Carpenters' Case, viz., that "not doing cannot make a party who has authority or license by law a trespasser *ab initio*, because not doing is no trespass," is controverted by some American decisions. Boston & M. R. Co. v. Small, 85 Me. 462, 27 Atl. 349, 35 Am. St. Rep. 379, and cases cited; cf. Wright v. Marvin, 59 Vt. 437, 9 Atl. 601; Williams v. Ives, 25 Conn. 568. At all events, the rule must not be applied too broadly. Thus if a man who seizes the property or arrests the person of another by legal process fails to execute or return the process in strict accordance with its requirements, he is often called a trespasser *ab initio*, for his whole justification fails, and he stands as if he had never had any authority to take the property or make the arrest. Brock v. Stimson, 108 Mass. 520, 11 Am. Rep. 390.)

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#### IV. TRESPASS BY JOINT TENANT.

(7 Man. G. & S. 441.)

MURRAY et al. v. HALL.

(Court of Common Pleas. Feb. 14, 1849.)

##### TRESPASS TO LAND—OUSTER OF CO-TENANT.

Trespass will lie by one tenant in common against another for an actual ouster of possession.

Rule to show cause why nonsuit should not be entered.

Action of trespass brought by Murray, Ash & Kennedy for breaking and entering the dwelling house of plaintiffs, and expelling them therefrom, and seizing and converting their goods. On the trial before Maule, J., it appeared that the premises in question had been leased by defendant, Hall, to the three plaintiffs and one Hart for a coffee-room, and that Hart surrendered his interest to Hall, who subsequently, with Hart, forcibly expelled from the premises the person put in charge thereof by plaintiffs, and kept possession. A verdict was rendered for plaintiffs for £35 damages. Defendant, on leave reserved at the trial, obtained a rule nisi to enter a nonsuit.

COLTMAN, J. This was an action for breaking and entering the plaintiffs' dwelling-house, and expelling them therefrom; to which the defendant pleaded—First, not guilty; secondly, leave and license; thirdly, a denial that the dwelling-house was the plaintiffs'. At the trial before Maule, J., one ground of defense was that the defendant was tenant in common of the house with the plaintiffs, and that, therefore, the action was not maintainable. The learned judge told the jury that, if the evidence satisfied them that there had been an actual expulsion of the plaintiffs from the house by the defendant, their verdict ought to be for the plaintiffs. The jury found for the plaintiffs damages £35. The defendant afterwards obtained a rule to show cause why a nonsuit should not be entered, (pursuant to leave given at the trial,) on the ground that one tenant in common cannot maintain trespass against another, even though there has been an actual expulsion. On showing cause, it was argued (before the Lord Chief Justice, and Justices Coltman, Cresswell, and V. Williams,) that this defense, even if sustainable, ought to have been specially pleaded. It is unnecessary to give any opinion on this point, for we are of opinion that the defense is not sustainable. The court has felt some difficulty on the question, by reason only of the doubts expressed by Littledale, J., in his judgment in *Cubitt v. Porter*, 8 Barn. & C. 269. That learned judge there said that although, if there has been actual ouster by one tenant in common, ejectment will lie at the suit of the other, yet he was not aware that trespass would lie; for that, in trespass, the breaking and entering is the gist of the action, and the expulsion or ouster is a mere aggravation of the trespass; and that, therefore, if the original trespass be lawful, trespass will not lie. It appears, however, to us difficult to understand why trespass should not lie, if ejectment (which includes trespass) may be maintained (as it confessedly may) on an actual ouster. And as it has been further established in the case of *Goodtitle v. Tombs*, 3 Wils. 118, that a tenant in common may maintain an action of trespass for mesne profits against his companion, it appears to us that there is no real foundation for the doubts suggested. We are therefore of the opin-

ion that the direction of Maule, J., at the trial was right, and consequently this rule must be discharged.

Rule discharged.

(See also *Filbert v. Hoff*, 42 Pa. 97, 82 Am. Dec. 493; *Byam v. Bickford*, 140 Mass. 31, 2 N. E. 687; *Dubois v. Beaver*, 25 N. Y. 123, 128, 82 Am. Dec. 326.)

## V. DEFENSES:—LICENSE, NECESSITY, ETC.

(15 Gray, 441, 77 Am. Dec. 373.)

GILES v. SIMONDS.

(Supreme Judicial Court of Massachusetts. June, 1860.)

**TRESPASS TO LAND—SALE OF STANDING TREES—LICENSE TO ENTER—REVOCA-  
TION.**

A verbal contract for the sale of standing trees, to be cut and removed by the purchaser, gives an implied license to enter for the purpose of cutting and removing the same. But such license is revocable at any time, even after full consideration paid, except as to an entry for the purpose of removing those trees cut before the revocation.

Exceptions from Superior Court, Franklin County.

Action of tort for breaking and entering plaintiff's close, and cutting trees standing thereon, which defendant justified under a verbal contract of sale of the trees. The consideration had been paid, and part of the trees had been felled and removed, when plaintiff revoked his license to go upon the land. The jury found a verdict for defendant. Plaintiff alleged exceptions.

BIGELOW, J. If the plaintiff had a right to revoke the license to enter upon his land, under which the defendant seeks to justify the acts of trespass alleged in the declaration, it is entirely clear that the verdict rendered in favor of the defendant cannot stand. The decision of the case turns, therefore, on the question whether an owner of land, who has entered into a verbal contract for the sale of standing wood and timber to be cut and severed from the freehold by the vendee, can, at his pleasure, revoke the license which he thereby gives to the purchaser to enter on his land, and cut and carry away the wood or timber included in the contract. That such a contract is not valid as passing an interest in the land is too well settled to admit of doubt. It is only an executory contract of sale, to be construed as conveying an interest in the trees when they shall be severed from the freehold, and shall become converted into personal property. Nor does the permission to enter on the land, which such a contract expressly or by implication confers on the vendee, operate

to create or vest in him any estate or interest in the premises. It is only a license or authority to do certain acts on the land, which but for such license or authority would be acts of trespass. If it were otherwise, if under such a contract a right were conferred on the vendee to enter on the land, and then to exercise a right or privilege at his own pleasure, free from the control of the owner of the land, during the continuance of the contract, it would clearly confer on the vendee a right or interest in the premises, which would contravene the statute of frauds. Rev. St. c. 74, § 1. There can be no doubt that a valid license to enter on land may be given by parol. But this rule rests on the distinction that a license is only an authority to do an act, or series of acts, on the land of another, and passes no estate or interest therein.

The nature and extent of the right or authority conferred by a license, and how far it is within the power of the licensor to modify or revoke it, have given rise to much discussion and many nice and subtle distinctions in the books, as well as conflicting decisions in the courts of common law. Certain principles, however, seem now to be well settled. If the owner of land sells chattels or other personal property situated on his land, the vendee thereby obtains an implied license to enter on the premises, and take possession of and remove the property. In such case the license is coupled with and supported by a valid interest or title in the property sold, and cannot be revoked. *Wood v. Manley*, 11 Adol. & E. 34; *Heath v. Randall*, 4 Cush. 195. So, too, if the owner of chattels or other personal property, by virtue of a contract with or the permission of the owner of land, places his property on the land, the license to enter upon it, for the purpose of taking and removing the property, is irrevocable. *Patrick v. Colerick*, 3 Mees. & W. 483; *Russell v. Richards*, 10 Me. 429, 25 Am. Dec. 254; and *Id.*, 11 Me. 371, 26 Am. Dec. 532; *Smith v. Benson*, 1 Hill, 176. The right of property in the chattels draws after it the right of possession. The license to enter on land to obtain possession of them is subsidiary to this right of property, which cannot be enjoyed if the license be withdrawn or terminated. This right in the chattels is not derived from the license, but exists in the owner by virtue of a distinct and separate title, the validity of which in no way depends on any right or interest in the land. But, with the assent of the owner of the land, the property has been placed in a situation where it cannot be used or enjoyed except by a license to enter upon his land. The continuance of this license is therefore essential to the enjoyment of the right. It would be a manifest breach of good faith to permit such a license to be revoked. No man should be permitted to keep the property of others by inducing them to place it upon his land, and then denying them the right to enter to regain its possession. A party is therefore not permitted to with-

draw his consent, by setting up his title to the land, after it has been acted on by others, and when their rights will be impaired or lost by its withdrawal. In like manner, and for similar reasons, a license to enter on land for the purpose of removing trees or timber therefrom, which have been felled in pursuance of a contract of sale, cannot be recalled. So far as it has been executed, the license is irrevocable. By virtue of the contract, and with the express or implied consent of the owner of the soil, the vendee has been induced to expend his money and services. The trees, so far as they have been severed from the freehold, have been converted into personal property, and vested in the vendee. A revocation of the license would, to the extent to which it had been executed, operate as a fraud on the vendee, and deprive him of property to which he had become legally entitled. Besides, the owner of the land cannot, by a subsequent revocation of his license, render that unlawful which, with all its incidents and necessary consequences, was lawful at the time it was done, by virtue of his own authority and consent. The true distinction between an executory verbal license to enter on land under a contract for the sale of timber or trees growing thereon, and a similar license executed, seems to be this: The former confers no vested interest or property, no money or labor is expended on the faith of it, and no right or title is impaired or lost by its revocation. If the party to whom it is granted is injured by its withdrawal, his remedy is by an action against the licensor for a breach of the contract. It cannot be held to extend further, so as to confer a right to use the land of another without his consent, because it would thus confer, *ex proprio vigore*, an interest in land, which cannot be created except by a writing. But such a license executed, to the extent to which it has been acted on, has operated to induce the vendee to expend money and services on the property, and thereby to convert it into personal chattels which have become vested in him. The revocation of the license in such case would deprive the vendee of his property. It has therefore been held that such a license, while it is executory, may be countermanded, but that when executed it becomes irrevocable. *Cook v. Stearns*, 11 Mass. 533; *Cheever v. Pearson*, 16 Pick. 273; *Ruggles v. Lesure*, 24 Pick. 190; *Claffin v. Carpenter*, 4 Metc. (Mass.) 580, 38 Am. Dec. 381; *Nettleton v. Sikes*, 8 Metc. (Mass.) 34.

Applying these principles to the case before us, it is clear that the defendant could not justify the acts of trespass charged in the declaration. Before his entry on the land for the purpose of cutting trees, the plaintiff revoked the license which he had given by the verbal contract of sale under which the defendant claimed to act. So far as the license was executory, it was revocable, and the entry of the defendant after its revocation was unlawful. The view which

we have taken of the case seems to render a decision of the other questions raised by the exceptions unnecessary.

Exceptions sustained.

(See also *Blaisdell v. Railroad Co.*, 51 N. H. 485; *Babcock v. Utter*, 1 Abb. Dec. 27; *Fargis v. Walton*, 107 N. Y. 398, 14 N. E. 303; *Lockhart v. Geir*, 54 Wis. 133, 11 N. W. 254; *Johnson v. Skillman*, 29 Minn. 95, 12 N. W. 149, 43 Am. Rep. 192; *Pursell v. Stover*, 110 Pa. 43, 20 Atl. 403; *Wood v. Leadbitter*, 13 Mees. & W. 838.)

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(113 Mass. 376, 18 Am. Rep. 500.)

PROCTOR v. ADAMS et al.

(Supreme Judicial Court of Massachusetts. November Term, 1873.)

TRESPASS TO LAND—ENTRY TO SAVE PROPERTY.

The entry upon the land of another, and removing a boat wrecked thereon, the property of third persons, is not a trespass, if the object was to prevent the loss or destruction of the boat by the elements, and restore it to the owner, and not to remove it under a claim of ownership.

On Report from Superior Court.

Action of tort in the nature of trespass quare clausum for entering plaintiff's close and carrying away a boat. The boat was a wreck cast upon plaintiff's beach between high and low water mark, found by defendants after a severe storm. They drew it up to high-water mark, but, not thinking it safe, subsequently took it away. They advertised it, and it was claimed by the owners, who paid them for their services and expenses, and took possession of it. The court ruled that these facts did not constitute a defense, and, defendants refusing to go to the jury on the instructions proposed, the judge reported the case to the supreme court.

GRAY, C. J. The boat, having been cast ashore by the sea, was a wreck, in the strictest legal sense. *Bl. Comm.* 106; *Chase v. Corcoran*, 106 Mass. 286, 288. Neither the finders of the boat, nor the owners of the beach, nor the commonwealth, had any title to the boat as against its former owner. *Body of Liberties*, art. 90; *Anc. Chart.* 211; 2 Mass. Col. Rec. 143; *St.* 1814, c. 170; *Rev. St. c.* 57; *Gen. St. c.* 81; 3 *Dane, Abr.* 134, 136, 138, 144; 2 *Kent, Comm.* 322, 359. But the owner of the land on which the boat was cast was under no duty to save it for him. *Sutton v. Buck*, 2 *Taunt.* 302, 312.

If the boat, being upon the land between high and low water mark owned or occupied by the plaintiff, was taken by the defendants, claiming it as their own, when it was not, the plaintiff had a sufficient right of possession to maintain an action against them. *Barker v. Bates*, 13 *Pick.* 255, 23 *Am. Dec.* 678; *Dunwich v. Sterry*, 1 *Barn.*

& Adol. 831. But if, as the evidence offered by them tended to show, the boat was in danger of being carried off by the sea, and they, before the plaintiff had taken possession of it, removed it for the purpose of saving and restoring it to its lawful owner, they were not trespassers. In such a case, though they had no permission from the plaintiff or any other person, they had an implied license by law to enter on the beach to save the property. It is a very ancient rule of the common law that an entry upon land to save goods which are in jeopardy of being lost or destroyed by water, fire, or any like danger, is not a trespass. 21 Hen. VII. 27, 28, pl. 5; Brooke, Abr. "Trespass," 213; Vin. Abr. "Trespass," (H, a, 4,) pl. 24 ad fin.; Id. (K, a,) pl. 3. In *Dunwich v. Sterry*, 1 Barn. & Adol. 831, a case very like this, Mr. Justice Parke (afterwards Baron Parke and Lord Wensleydale) left it to the jury to say whether the defendant took the property for the benefit of the owners, or under a claim of his own, and to put the plaintiffs to a proof of their title. In *Barker v. Bates*, 13 Pick. 255, 23 Am. Dec. 678, upon which the plaintiff mainly relies, the only right claimed by the defendants was as finders of the property and for their own benefit. The defendants are therefore entitled to a new trial. As the answer was not objected to, and the declaration may be amended in the court below, we have not considered the form of the pleadings.

New trial ordered.

(See also *Print Works v. Lawrence*, 23 N. J. Law, 9; *Id.*, 23 N. J. Law, 590, 57 Am. Dec. 420; *New York v. Lord*, 18 Wend. 126.)

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(7 Cush. 408, 54 Am. Dec. 728.)

CAMPBELL v. RACE (In part).

(Supreme Judicial Court of Massachusetts. September Term, 1851.)

TRESPASS TO LAND—NECESSITY—OBSTRUCTIONS TO HIGHWAY.

Where a highway becomes obstructed and impassable from temporary causes, a traveler has the right to go upon adjoining lands and so pass by without being guilty of trespass.

Exceptions from Court of Common Pleas.

Action of trespass to land. Defendant justified going upon plaintiff's land under a right of way of necessity resulting from the impassable state of the adjoining highway by snow-drifts. The court ruled that such fact constituted no defense. A verdict was returned for plaintiff. Defendant alleged exceptions.

BIGELOW, J. It is not controverted by the counsel for the plaintiff that the rule of law is well settled in England that, where a highway becomes obstructed and impassable from temporary causes,

a traveler has a right to go extra viam upon adjoining lands, without being guilty of trespass. The rule is so laid down in the elementary books, (2 Bl. Comm. 36; Woolr. Ways, 50, 51; 3 Cruise, Dig. 89; Wellb. Ways, 38;) and it is fully supported by the adjudged cases, (Henn's Case, W. Jones, 296; Osborne v. Sture, 3 Salk. 182; Pomfret v. Ricroft, 1 Saund. 323, note 3; Absor v. French, 2 Show. 28; Young v. ———, 1 Ld. Raym. 725; Taylor v. Whitehead, 2 Doug. 745; Bullard v. Harrison, 4 Maule & S. 387, 393.)

Such being the admitted rule of law, as settled by the English authorities, it was urged in behalf of the plaintiff, in the present case, that it had never been recognized or sustained by American authors or cases. But we do not find such to be the fact. On the contrary, Mr. Dane, whose great learning and familiar acquaintance with the principles of common law, and their practical application at an early period in this commonwealth, entitle his opinion to very great weight, adopts the rule, as declared in the leading case of Taylor v. Whitehead, ubi supra, which he says "is the latest on the point, and settles the law." 3 Dane, Abr. 258. And so Chancellor Kent states the rule. 3 Kent, Comm. 324. We are not aware of any case in which the question has been distinctly raised and adjudicated in this country, but there are several decisions in New York in which the rule has been incidentally recognized and treated as well-settled law. Holmes v. Seely, 19 Wend. 507; Williams v. Safford, 7 Barb. 309; Newkirk v. Sabler, 9 Barb. 652. These authorities would seem to be quite sufficient to justify us in the recognition of the rule. But the rule itself is founded on the established principles of the common law, and is in accordance with the fixed and uniform usage of the community. Indeed, one of the strongest arguments in support of it is that it has always been practiced upon and acquiesced in, without objection, throughout the New England states. This accounts satisfactorily for the absence of any adjudication upon the question in our courts, and is a sufficient answer to the objection upon this ground which was urged upon us by the learned counsel for the plaintiff. When a right has long been claimed and exercised without denial or objection, a strong presumption is raised that the right is well founded.

The plaintiff's counsel is under a misapprehension in supposing that the authorities in support of the rule rest upon any peculiar or exceptional principle of law. They are based upon the familiar and well-settled doctrine that to justify or excuse an alleged trespass inevitable necessity or accident must be shown. If a traveler in a highway, by unexpected and unforeseen occurrences, such as a sudden flood, heavy drifts of snow, or the falling of a tree, is shut out from the traveled paths, so that he cannot reach his destination without passing upon adjacent lands, he is certainly under a necessity to do so. It is essential to the act to be done, without which it cannot be accom-

plished. Serious inconveniences, to say the least, would follow, especially in a climate like our own, if this right were denied to those who have occasion to pass over the public ways. Not only would intercourse and business be sometimes suspended, but life itself would be endangered. In hilly and mountainous regions, as well as in exposed places near the sea-coast, severe and unforeseen storms not unfrequently overtake the traveler, and render highways suddenly impassable, so that to advance or retreat by the ordinary path is alike impossible. In such cases the only escape is by turning out of the usually traveled way, and seeking an outlet over the fields adjoining the highway. If a necessity is not created, under such circumstances, sufficient to justify or excuse a traveler, it is difficult to imagine a case which would come within the admitted rule of law. To hold a party guilty of a wrongful invasion of another's rights for passing over land adjacent to the highway, under the pressure of such a necessity, would be pushing individual rights of property to an unreasonable extent, and giving them a protection beyond that which finds a sanction in the rules of law. Such a temporary and unavoidable use of private property must be regarded as one of those incidental burdens to which all property in a civilized community is subject. In fact, the rule is sometimes justified upon the ground of public convenience and necessity. Highways being established for public service and for the use and benefit of the whole community, a due regard for the welfare of all requires that, when temporarily obstructed, the right of travel should not be interrupted. In the words of Lord Mansfield, "it is for the general good that people should be entitled to pass in another line." It is a maxim of the common law that, where public convenience and necessity come in conflict with private right, the latter must yield to the former. A person traveling on a highway is in the exercise of a public, and not a private, right. If he is compelled, by impassable obstructions, to leave the way, and go upon adjoining lands, he is still in the exercise of the same right. The rule does not, therefore, violate the principle that individual convenience must always be held subordinate to private rights, but clearly falls within that maxim which makes public convenience and necessity paramount.

It was urged in argument that the effect of establishing this rule of law would be to appropriate private property to public use without providing any means of compensation to the owner. If such an accidental, occasional, and temporary use of land can be regarded as an appropriation of private property to public use, entitling the owner to compensation, which may well be doubted, still the decisive answer to this objection is quite obvious. The right to go extra viam, in case of temporary and impassable obstructions, being one of the legal incidents or consequences which attach to a highway through private property, it must be assumed that the right to the use of land adjoining

ing the road was taken into consideration, and proper allowance made therefor, when the land was originally appropriated for the highway, and that the damages were then estimated and fixed for the private injury which might thereby be occasioned.

From what has already been said, the limitations and restrictions of the right to go upon adjacent lands in case of obstructions in the highway can be readily inferred. Having its origin in necessity, it must be limited by that necessity,—*cessante ratione cessat ipsa lex*. Such a right is not to be exercised from convenience merely, nor when by the exercise of due care, after notice of obstructions, other ways may be selected, and the obstructions avoided. But it is to be confined to those cases of inevitable necessity or unavoidable accident, arising from sudden and recent causes, which have occasioned temporary and impassable obstructions in the highway. What shall constitute such inevitable necessity or unavoidable accident must depend upon the various circumstances attending each particular case. The nature of the obstruction in the road, the length of time during which it has existed, the vicinity or distance of other public ways, the exigencies of the traveler, are some of the many considerations which would enter into the inquiry, and upon which it is the exclusive province of the jury to pass, in order to determine whether any necessity really existed which would justify or excuse the traveler. In the case at bar this question was wholly withdrawn from the consideration of the jury by the ruling of the court. It will therefore be necessary to send the case to a new trial in the court of common pleas.

Exceptions sustained.

(See also *Morey v. Fitzgerald*, 56 Vt. 487, 48 Am. Rep. 811; *Carey v. Rae*, 58 Cal. 159; *Haley v. Colcord*, 59 N. H. 7, 47 Am. Rep. 176.)

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(5 Johns. 352.)

**WILLIAMS v. SPENCER.**

(Supreme Court of New York. February Term, 1810.)

**TRESPASS TO LAND—BREAKING OPEN DOOR TO SERVE PROCESS.**

The owner of a house, renting the same, reserved an inner room, which he occupied. A constable, having a warrant against him, entered by the outer door, which was open, and broke open the door of such inner room and arrested him. *Held*, that the constable was not a trespasser.

In error, on certiorari.

Action of trespass *quare clausum fregit* brought by Spencer against Williams. It appeared at the trial before a justice of the peace that Spencer let out part of his house, and reserved an inner room for himself, which he occupied; that Williams, who was a constable, having a warrant against Spencer, the outer door of the house being

open, broke open the door of the inner room, and arrested him. The justice gave judgment for plaintiff, and defendant brought up the case by certiorari and writ of error.

**PER CURIAM.** There was no protection, in this case, to the door of the inner room, though occupied separately by the defendant in error. The constable had a right, therefore, to break the door. *Lee v. Gansel*, Cowp. 1.

The judgment must be reversed.

(See also *Hubbard v. Mace*, 17 Johns. 127; *Hager v. Danforth*, 20 Barb. 16; *Comm. v. Tobin*, 108 Mass. 426, 11 Am. Rep. 375. A sheriff, constable, or other peace officer has no right to break the outer door of a dwelling house in the execution of civil process, and it is deemed a breaking if he merely lifts the latch of a closed door and enters. *Curtis v. Hubbard*, 4 Hill, 437, 40 Am. Dec. 292.)

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(10 Q. B. Div. 17.)

**TILLET v. WARD.**

(Court of Queen's Bench. November 27, 1882.)

**TRESPASS TO LAND—CATTLE ESCAPING FROM HIGHWAY.**

Defendant's ox, while being driven along the highway in a town, without any negligence on defendant's part, escaped from him, and entered plaintiff's adjoining premises through an open door. *Held*, that an action would not lie for plaintiff's damages.

Appeal by special case from the decision of the judge of the county court of Lincolnshire, holden at Stamford.

Action for injuries to goods in plaintiff's shop, caused by defendant's ox, which came through the open doorway after escaping from defendant's servants, who were driving it along the public street in Stamford in the usual and customary manner. There was no evidence of negligence of defendant's servants, or that the ox was vicious, or that there was anything exceptional in its temper and character. The county court judge gave a verdict for the amount claimed, giving the defendant leave to appeal.

**COLERIDGE, C. J.** In this action the county court judge has found as a fact that there was no negligence on the part of the drivers of the ox, or, at all events, he has not found that there was negligence; and, as it lies on the plaintiff to make out his case, the charge of negligence, so far as it has any bearing on the matter, must be taken to have failed.

Now, it is clear, as a general rule, that the owner of cattle and sheep is bound to keep them from trespassing on his neighbor's land, and, if they so trespass, an action for damages may be brought against him, irrespective of whether the trespass was or was not the result

of his negligence. It is also tolerably clear that where both parties are upon the highway, where each of them has a right to be, and one of them is injured by the trespass of an animal belonging to the other, he must, in order to maintain his action, show that the trespass was owing to the negligence of the other or of his servant. It is also clear that, where a man is injured by a fierce or vicious animal belonging to another, *prima facie* no action can be brought without proof that the owner of the animal knew of its mischievous tendencies. In the present case, the trespass, if there was any, was committed off the highway upon the plaintiff's close, which immediately adjoined the highway, by an animal belonging to the defendant, which was being driven on the highway. No negligence is proved, and it would seem to follow, from the law which I have previously stated, that the defendant is not responsible. We find it established, as an exception upon the general law of trespass, that, where cattle trespass upon unfenced land immediately adjoining a highway, the owner of the land must bear the loss. This is shown by the judgment of Bramwell, B., in *Goodwyn v. Cheveley*, 4 H. & N. 631. That learned judge goes into the question whether a reasonable time had or had not elapsed for the removal of cattle who had trespassed under similar circumstances, and this question would not have arisen if a mere momentary trespass had been by itself actionable. There is also the statement of Blackburn, J., in *Fletcher v. Rylands*, L. R. 1 Exch. 265, that persons who have property adjacent to a highway may be taken to hold it subject to the risk of injury from inevitable risk. I could not, therefore, if I were disposed, question law laid down by such eminent authorities; but I quite concur in their view, and I see no distinction for this purpose between a field in the country and a street in a market town. The accident to the plaintiff was one of the necessary and inevitable risks which arise from driving cattle in the streets in or out of town. No cause of action is shown, and the judgment of the county court judge must be reversed.

STEPHEN, J. I am of the same opinion. As I understand the law, when a man has placed his cattle in a field, it is his duty to keep them from trespassing on the land of his neighbors; but while he is driving them upon a highway he is not responsible, without proof of negligence on his part, for any injury they may do upon the highway, for they cannot then be said to be trespassing. The case of *Goodwyn v. Cheveley*, 4 H. & N. 631, seems to me to establish a further exception, that the owner of the cattle is not responsible without negligence when the injury is done to property adjoining the highway,—an exception which is absolutely necessary for the conduct of the common affairs of life. We have been invited to limit this exception to the case of high roads adjoining fields in the country, but I am very unwilling to multiply exceptions, and I can see no solid

distinction between the case of an animal straying into a field which is unfenced or into an open shop in a town. I think the rule to be gathered from *Goodwyn v. Cheveley* a very reasonable one, for otherwise I cannot see how we could limit the liability of the owner of cattle for any sort of injury which could be traced to them.

Judgment for defendant.

(Where cattle driven along a highway stray from it in sight of the person in charge of them, and pass, against his will, onto uninclosed land adjoining the highway, and he makes fresh pursuit to bring them back, the owner ought not to be chargeable for this involuntary trespass. Per *Beardsley, J.*, in *Tonawanda R. Co. v. Munger*, 5 Denio, 255, 49 Am. Dec. 239. To the same effect are *Hartford v. Brady*, 114 Mass. 466, 19 Am. Rep. 377; *Cool v. Crommet*, 13 Me. 250; *Bush v. Brainard*, 1 Cow. 78, 13 Am. Dec. 513, and note.)

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(37 N. H. 331, 72 Am. Dec. 332.)

#### LAWRENCE v. COMBS.

(Supreme Judicial Court of New Hampshire. July Term, 1858.)

#### TRESPASS TO LAND—ADJOINING TENANTS—OBLIGATION TO FENCE.

Trespass will not lie by the tenant of a close against an adjoining proprietor for damage done by cattle of a third person, which, straying upon the highway, enter defendant's lands, and from there pass upon plaintiff's land, through a defect in that portion of the division fence which defendant was by law bound to keep in repair. *Rev. St. N. H. c. 136, § 1.*

On report of referee.

Action on the case for negligence. It appeared on trial before a referee that cattle of a third person straying on the highway entered upon defendant's land, and therefrom passed upon plaintiff's adjoining land through a defective fence at a point where defendant was by law bound to build and keep in repair the division fence. The referee reported the facts for the judgment of the court.

**EASTMAN, J.** At common law, a tenant or owner was not obliged to fence against an adjoining owner or occupier, except by prescription, but he was to keep his cattle on his own land at his peril; and, if they escaped, they might be taken on whatever land they were found damage feasant, or the owner was liable to an action of trespass by the party injured. And where there was no prescription, but the tenant had made an agreement to fence, he could not be compelled to carry out his agreement and make the fence; and the party injured by the breach of the agreement had no remedy but by an action on the agreement. *Nowel v. Smith*, Cro. Eliz. 709; *Rust v. Low*, 6 Mass. 94; *Avery v. Maxwell*, 4 N. H. 36; *Deyo v. Stewart*, 4 Denio, 101; 3 Kent, Comm. 438; *Dean v. Railroad*, 22 N. H. 317; *Glidden v. Towle*, 31 N. H. 168.

In case of a prescription to fence, the tenant could be compelled to fence by the writ of *curia claudenda*, sued out by the tenant of the adjoining close, who could also recover damages by that writ. Fitzh. Nat. Brev. "*Curia Claudenda*," 297; *Rust v. Low*, 6 Mass. 94; *Glidden v. Towle*, 31 N. H. 168. But, by statute, the owners of adjoining lands, under improvement, are required to make and repair the partition fences between them. Rev. St. c. 136, § 1. And after the fence has been divided, the owner of a close can sustain no action for damages done by horses or cattle breaking into his close, through defects in the fence which he was bound to make and repair, if they were rightfully on the adjoining land. *Avery v. Maxwell*, 4 N. H. 36; *York v. Davis*, 11 N. H. 241; *Page v. Olcott*, 13 N. H. 399. Where there are adjoining closes, with an undivided partition fence, which each owner is bound to keep in repair, each is required to keep his cattle on his own land at his peril. *Tewksbury v. Bucklin*, 7 N. H. 518; *Avery v. Maxwell*, 4 N. H. 36; *Thayer v. Arnold*, 4 Metc. (Mass.) 589; *Little v. Lathrop*, 5 Greenl. 356.

At common law the tenant of a close who was obliged by prescription to fence was not required to do it against any cattle except those which were rightfully in the adjoining close. *Salkwell v. Milwarde*, 26 Hen. VI. c. 23; 10 Edw. IV. c. 7; Fitzh. Nat. Brev. "*Curia Claudenda*," 1, 2; *Rust v. Low*, 6 Mass. 99, 100; 3 Kent, Comm. 438. And the same rule has been held to prevail where statutes have been adopted regulating the rights and duties of adjoining owners in regard to fences. In *Rust v. Low*, already cited, which is a leading American case upon the question, the point was distinctly decided that the tenant of a close is not obliged to fence except against cattle which are rightfully upon the adjoining land. In *Avery v. Maxwell*, 4 N. H. 37, Chief Justice Richardson says that "it is well settled that the owner of a close is only bound to fence against creatures which are rightfully on the adjoining land." And in *Holladay v. Marsh*, 3 Wend. 147, 20 Am. Dec. 678, Chief Justice Savage also says that "it is certainly well settled that a man is not obliged to fence against any cattle but such as may be rightfully upon the adjoining close." This doctrine is sustained by many authorities, among which may be cited *Wells v. Howell*, 19 Johns. 385; *Stackpole v. Healy*, 16 Mass. 38, 8 Am. Dec. 121; *Lord v. Wormwood*, 29 Me. 282, 1 Am. Rep. 586; *Hurd v. Railroad Co.*, 25 Vt. 122; *Dovaston v. Payne*, 2 H. Bl. 527; *Cornwall v. Railroad*, 28 N. H. 167.

From the declaration of the plaintiff, it appears that he and the defendant were owners of adjoining closes; that the fence between them had been divided; and that the defendant's portion of the fence was out of repair. Upon this state of facts, and according to the principles stated, there can be no doubt that the defendant would be liable, had the cattle that committed the trespass upon the plaintiff's land been rightfully in the close of the defendant, for they went into

the plaintiff's close over that part of the fence which the defendant was bound to maintain. But the cattle that committed the trespass were not the property of the defendant, nor were they upon his land by his permission; but they belonged to third persons, and strayed from the highway—where they do not appear to have been for any legitimate purpose—into the defendant's close, and thence came upon the plaintiff's land and did the damage. Both the plaintiff and defendant could maintain their actions against the owners of the cattle for the trespasses committed; for, not being rightfully in the highway, it is immaterial what the situation of their fences were. They were not obliged to fence against wrong-doers. The authorities cited settled this position.

[The opinion concludes with an examination of the provisions of the New Hampshire statute as to division fences, (Rev. St. c. 136,) which, however, it is held, do not change the result.]

Our conclusion is that there should be,

Judgment on the report for the defendant.

(See also *Tonawanda R. Co. v. Munger*, 5 Denio, 255, 49 Am. Dec. 239; *Thayer v. Arnold*, 4 Metc. [Mass.] 589; *Knox v. Tucker*, 48 Me. 373, 77 Am. Dec. 233; *Scott v. Grover*, 56 Vt. 499, 48 Am. Rep. 814. About half of the states of this country hold the common-law rule in regard to fences applicable, in the absence of any statute on the subject, while the other half hold that an owner who has not fenced his land cannot recover for a trespass by his neighbor's cattle. 12 Am. & Eng. Enc. of Law [2d Ed.] 1040-1044. It is a generally accepted doctrine that when an obligation to fence is created by statute, this obligation only applies to such cattle as are lawfully on the adjoining premises. *Id.* 1058, 1084. By some statutes, however, a different rule is established in regard to railroad fences. *Dayton v. New York, L. E. & W. R. Co.*, 81 Hun, 284, 30 N. Y. Supp. 783.)

## NUISANCE.

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### I. WHAT CONSTITUTES A NUISANCE—PRESCRIPTIVE RIGHT TO MAINTAIN A NUISANCE—INJUNCTION TO RESTRAIN.

(63 N. Y. 568, 20 Am. Rep. 567.)

CAMPBELL et al. v. SEAMAN (In part).

(Court of Appeals of New York. Jan. 21, 1876.)

#### 1. NUISANCE—WHAT CONSTITUTES.

The unreasonable, unwarrantable, or unlawful use of one's own property, producing material annoyance, inconvenience, discomfort, or hurt to his neighbor, constitutes a nuisance.

#### 2. SAME—BRICK-BURNING.

The burning of brick in a kiln, which produces noxious gases, injuring another's property, is a nuisance, though brick-burning is a useful and necessary industry.

#### 3. INJUNCTION—WHEN GRANTED.

The writ of injunction is not a matter of grace, but of right, in a proper case, and will be granted to restrain irreparable injury, whether it be to the enjoyment of the necessities or the luxuries of life.

#### 4. SAME.

The destruction of ornamental and useful trees and vines by the vapors and gases from a brick-kiln is such irreparable injury as a court of equity will enjoin.

#### 5. NUISANCE—PRESCRIPTIVE RIGHT TO MAINTAIN.

A person cannot, by erecting a nuisance upon his land adjoining vacant land owned by another, control or lessen the latter's use of the land, unless he can acquire such right by prescription.

#### 6. SAME.

Where the injury to shrubbery on plaintiff's premises is caused by the burning of anthracite coal in a brick-kiln on adjoining premises by defendant, a prescriptive right to continue the nuisance must be based upon 20 years' actual use of such coal, and not 20 years' use of the kiln.

Appeal from Supreme Court, General Term, Third Department.

Action by Samuel B. Campbell and others against Nathan N. Seaman to recover damages from an alleged nuisance and to restrain the continuance thereof. The nuisance consisted in the burning of brick by anthracite coal on defendant's premises, which killed the foliage, trees, and shrubbery on plaintiffs' adjoining premises. The referee by whom the case was tried found for plaintiffs, and the general term affirmed the judgment entered upon his report. From the judgment of the general term defendant appealed.

EARL, J. The plaintiffs owned about 40 acres of land, situate in the village of Castleton, on the east bank of the Hudson river, and had owned it since about 1849. During the years 1857, 1858, and 1859 they built upon it an expensive dwelling-house; and during those years, and before and since, they improved the land by grading and terracing, building roads and walks through the same, and planting trees and shrubs, both ornamental and useful. The defendant had for some years owned adjoining lands, which he had used as a brick-yard. The brick-yard is southerly of plaintiffs' dwelling-house about 1,320 feet, and southerly of their woods about 567 feet. In burning bricks defendant had made use of anthracite coal. During the burning of a kiln sulphuric acid gas is generated, which is destructive to some kinds of trees and vines. The evidence shows, and the referee found, that gas coming from defendant's kilns had, during the years 1869 and 1870, killed the foliage on plaintiffs' white and yellow pines and Norway spruce, and had, after repeated attacks, killed and destroyed from 100 to 150 valuable pine and spruce trees, and had injured their grape-vines and plum trees, and he estimated plaintiffs' damages from the gas during those years at \$500. This gas did not continually escape during the burning of a kiln, but only during the last two days, and was carried into and over plaintiffs' land only when the wind was from the south.

It is a general rule that every person may exercise exclusive dominion over his own property, and subject it to such uses as will best subserve his private interests. Generally, no other person can say how he shall use or what he shall do with his property. But this general right of property has its exceptions and qualifications. *Sic utere tuo ut alienum non lædas* is an old maxim which has a broad application. It does not mean that one must never use his own so as to do any injury to his neighbor or his property. Such a rule could not be enforced in civilized society. Persons living in organized communities must suffer some damage, annoyance, and inconvenience from each other. For these they are compensated by all the advantages of civilized society. If one lives in the city, he must expect to suffer the dirt, smoke, noisome odors, noise, and confusion incident to city life. As Lord Justice James beautifully said, in *Salvin v. Coal Co.*, L. R. 9 Ch. App. 705: "If some picturesque haven opens its arms to invite the commerce of the world, it is not for this court to forbid the embrace, although the fruit of it should be the sights and sounds and smells of a common seaport and ship-building town, which would drive the dryads and their masters from their ancient solitudes."

But every person is bound to make a reasonable use of his property, so as to occasion no unnecessary damage or annoyance to his neighbor. If he make an unreasonable, unwarrantable, or unlawful use of it, so as to produce material annoyance, inconvenience, dis-

comfort, or hurt to his neighbor, he will be guilty of a nuisance to his neighbor, and the law will hold him responsible for the consequent damage. As to what is a reasonable use of one's own property cannot be defined by any certain general rules, but must depend upon the circumstances of each case. A use of property in one locality, and under some circumstances, may be lawful and reasonable, which, under other circumstances, would be unlawful, unreasonable, and a nuisance. To constitute a nuisance, the use must be such as to produce a tangible and appreciable injury to neighboring property, or such as to render its enjoyment specially uncomfortable or inconvenient.

Within the rules thus referred to, that defendant's brick-burning was a nuisance to plaintiffs cannot be doubted. Numerous cases might be cited, but it will be sufficient to cite mainly those where the precise question was involved in reference to brick-burning.

The earliest case is that of *Duke of Grafton v. Hilliard*, decided in 1736, not reported, but referred to in *Attorney General v. Cleaver*, 18 Ves. 211. Chancellor Eldon there says that the court held in that case that "the manufacture of bricks, though near the habitations of men, if carried on for the purpose of making habitations for them, is not a public nuisance." By looking at that case, as found in a note to *Walter v. Selfe*, 4 Eng. Law & Eq. 18, it will be seen that no such decision was made in that case, and that no such language was used therein. A temporary injunction had been granted in the first instance, restraining brick-burning, but it was dissolved upon the defendant's showing that it would really produce no annoyance or injury to the plaintiff.

In *Donald v. Humphrey*, 14 F. (Sc.) 1206, the plaintiff brought an action to restrain brick-burning, and insisted that the business was per se a nuisance, and should be restrained without proof of actual injury, but the court held that the business of burning brick was a lawful business, and not per se a nuisance, but that the question as to whether it was a nuisance or not was one of fact, to be determined by the circumstances of each case, and refused an injunction without proof that the business was so conducted as to be a nuisance to the plaintiff.

In the case of *Walter v. Selfe*, supra, the defendants were enjoined from burning bricks in the vicinity of the plaintiffs' premises so as to occasion damage or annoyance to the plaintiffs, or injury or damage to the buildings thereon standing, or shrubberies or plantation, named in the bill.

In *Pollock v. Lester*, 11 Hare, 266, the defendant was making preparations to burn bricks near a lunatic asylum of which plaintiff was proprietor, and plaintiff brought his bill praying an injunction to restrain the defendant, alleging in his bill that the smoke and vapor arising from the brick-burning would be injurious to his patients, and

cause them to leave his asylum, and would also injure the trees, shrubs, and plants thereon growing; and the injunction was granted. This was done, it will be seen, merely upon the apprehension of damage, and before any was actually suffered.

After the decision of this case, *Hole v. Barlow*, 4 C. B. (N. S.) 336, was decided. That was an action for a nuisance arising from the burning of bricks on defendant's own land near to the plaintiff's dwelling-house, and the judge at the trial told the jury that no action lies for the reasonable use of a lawful trade in a convenient and proper place, even though some one may suffer inconvenience from its being carried on, and he left two questions to the jury—First, "Was the place in which the bricks were burned a proper and convenient place for the purpose?" Secondly, if they thought the place was not a proper place for the purpose, then "was the nuisance such as to make the enjoyment of life and property uncomfortable?" It was held that there was no misdirection. That case, which was in conflict with prior authorities, has since been overruled in *Beardmore v. Tredwell*, 31 Law J. Ch. 892; *Bamford v. Turnley*, 31 Law J. Q. B. 286; *Cavey v. Ledbitter*, 13 C. B. (N. S.) 470; *Bareham v. Hall*, 22 Law T. (N. S.) 116; *Roberts v. Clarke*, 18 Law T. (N. S.) 49; *Luscombe v. Steer*, 17 Law T. (N. S.) 229.

In *Beardmore v. Tredwell* the court granted an injunction restraining the burning of bricks within 650 yards of the plaintiff's dwelling, holding that the burning of bricks within 350 yards of the plaintiff's residence was a nuisance, although the bricks were to be used in the erection of government fortifications. Vice-Chancellor Stuart says: "Upon the facts of the present case, notwithstanding the contradictory evidence, my mind is satisfied that there has been an actual and positive injury to the plaintiff; that the comfort and enjoyment of his mansion-house are injured; that the trees planted and standing and growing for ornament have been, in some cases, entirely destroyed, and in many cases injured."

In *Bamford v. Turnley*, Cockburn, C. J., before whom the case was tried, followed *Hole v. Barlow*, and charged the jury that if they thought the spot was convenient and proper, and that the use by the defendant of his premises was, under the circumstances, a reasonable use of his own land, he would be entitled to a verdict. The jury found for the defendant, but upon the hearing in the exchequer chamber it was held that the instructions were erroneous, and that it was no answer, in an action for nuisance creating actual annoyance and discomfort in the enjoyment of neighboring property, that the injury resulted from a reasonable use of the property, and that the act was done in a convenient place, nor that the same business had been carried on in the same locality for 17 years. The doctrine of *Hole v. Barlow* was distinctly repudiated, and that case was in terms overruled.

In *Cavey v. Ledbitter*, an action for a nuisance caused by brick-burning, the judge at the trial left it to the jury, in substance, to say whether the acts of the defendant rendered the plaintiff's residence substantially uncomfortable, and whether his shrubs and fruit-trees had been thereby injured; and he refused to ask them whether the bricks had been burned in a convenient place, and it was held that there was no misdirection.

In *Bareham v. Hall* a bill was filed for an injunction to restrain the defendant from using a brick-kiln in such a way as to be a nuisance to the property of plaintiff, or to plaintiff and his family. There, as here, the damage and annoyance were suffered only when the wind blew from the direction of the kiln; and Vice-Chancellor Stuart said "that, *prima facie*, a brick-kiln built within 100 yards in front of a mansion-house would be a nuisance, unless the process used for burning the bricks was one of an unusual kind."

In this country, so far as I can ascertain, the question of nuisance from brick-burning has rarely been before the courts. The only case to which our attention has been called is *Huckenstine's Appeal*, 70 Pa. 102, 10 Am. Rep. 669. In that case *Agnew, J.*, says: "Brick-making is a useful and necessary employment, and must be pursued near to towns and cities where bricks are chiefly used. Brick-burning, an essential part of the business, is not a nuisance *per se*. *Attorney General v. Cleaver*, 18 Ves. 219. It, as many useful employments do, may produce some discomfort, and even some injury, to those near by, but it does not follow that a chancellor would enjoin therefor." He then goes on to say that the aid of an injunction is not matter of right, but of grace; and concludes that there were so many similar nuisances in the locality that it was not clear that this nuisance increased the discomfort from them, and that it was doubtful whether the plaintiff had suffered any material damage from the acts, and therefore held that an injunction ought not to issue, and that the plaintiff should be left to his remedy at law. In the following analogous cases, useful industries, which produced smoke or noxious gases or vapors or odors, were declared nuisances: *Catlin v. Valentine*, 9 Paige, 575, 38 Am. Dec. 567; *Peck v. Elder*, 3 Sandf. 129; *Taylor v. People*, 6 Parker, Cr. R. 352; *Davis v. Lambertson*, 56 Barb 480; *Hutchins v. Smith*, 63 Barb. 251; *Whitney v. Bartholomew*, 21 Conn. 213; *Cooper v. Randall*, 53 Ill. 24; *Rex v. White*, 1 Burrows, 337; *Cooke v. Forbes*, L. R. 5 Eq. 166; *Sampson v. Smith*, 8 Sim. 272; *Tipping v. Smelting Co.*, 4 Best & S. 608; *Crump v. Lambert*, L. R. 3 Eq. 409; *Pointer v. Gill*, 2 Rolle, Abr. 140. Without further citation of authority, I think it may safely be said that no definition of nuisance can be found in any text-book or reported decision which will not embrace this case.

But the claim is made that, although the brick-burning in this case is a nuisance, a court of equity will not and ought not to restrain it,

and the plaintiffs should be left to their remedy at law to recover damages, and this claim must now be examined. Prior to Lord Eldon's time, injunctions were rarely issued by courts of equity. During the many years he sat upon the woolsack this remedy was resorted to with increasing frequency, and, with the development of equity jurisprudence which has taken place since his time, it is well said that the writ of injunction has become the right arm of the court. It was formerly rarely issued in the case of a nuisance until plaintiff's right had been established at law, and the doctrine which seems now to prevail in Pennsylvania, that this writ is not matter of right, but of grace, to a large extent prevailed. But now a suit at law is no longer a necessary preliminary, and the right to an injunction, in a proper case, in England and most of the states, is just as fixed and certain as the right to any other provisional remedy. The writ can rightfully be demanded to prevent irreparable injury, interminable litigation, and a multiplicity of suits, and its refusal in a proper case would be error to be corrected by an appellate tribunal. It is matter of grace in no sense, except that it rests in the sound discretion of the court, and that discretion is not an arbitrary one. If improperly exercised in any case, either in granting or refusing it, the error is one to be corrected upon appeal. *Corning v. Nail Factory*, 40 N. Y. 191; *Reid v. Gifford*, Hopk. Ch. 416; *Pollitt v. Long*, 58 Barb. 20; *Railroad Co. v. Archer*, 6 Paige, 83; *Parker v. Woollen Co.*, 2 Black, 545, 551, 17 L. Ed. 333; *Webber v. Gage*, 39 N. H. 182; *Dent v. Auction Mart Co.*, 35 Law J. Ch. 555; *Attorney General v. Telegraph Co.*, 30 Beav. 287; *Wood v. Sutcliffe*, 2 Sim. (N. S.) 165. *Clowes v. Potteries Co.*, L. R. 8 Ch. App. 125. Here the remedy at law was not adequate. The mischief was substantial, and, within the principle laid down in the cases above cited, and others to which our attention has been called, irreparable.

The plaintiffs had built a costly mansion, and had laid out their grounds, and planted them with ornamental and useful trees and vines, for their comfort and enjoyment. How can one be compensated in damages for the destruction of his ornamental trees, and the flowers and vines which surrounded his home? How can a jury estimate their value in dollars and cents? The fact that trees and vines are for ornament or luxury entitles them no less to the protection of the law. Every one has the right to surround himself with articles of luxury, and he will be no less protected than one who provides himself only with articles of necessity. The law will protect a flower or a vine as well as an oak. *Cooke v. Forbes*, L. R. 5 Eq. 166; *Broadbent v. Gas Co.*, 7 De Gex, M. & G. 436. These damages are irreparable, too, because the trees and vines cannot be replaced, and the law will not compel a person to take money rather than the objects of beauty and utility which he places around his dwelling to gratify his taste or to promote his comfort and his health.

Here the injunction also prevents a multiplicity of suits. The injury is a recurring one, and every time the poisonous breath from defendant's brick-kiln sweeps over plaintiffs' land they have a cause of action. Unless the nuisance be restrained, the litigation would be interminable. The policy of the law favors, and the peace and good order of society are best promoted by, the termination of such litigation by a single suit. The fact that this nuisance is not continual, and that the injury is only occasional, furnishes no answer to the claim for an injunction. The nuisance has occurred often enough within two years to do the plaintiffs large damage. Every time a kiln is burned some injury may be expected, unless the wind should blow the poisonous gas away from plaintiffs' lands. Nuisances causing damage less frequently have been restrained. *Ross v. Butler*, 19 N. J. Eq. 294, 97 Am. Dec. 654; *Meigs v. Lister*, 23 N. J. Eq. 200; *Clowes v. Potteries Co.*, *supra*; *Mulligan v. Elias*, 12 Abb. Prac. (N. S.) 259. It matters not that the brick-yard was used before plaintiffs bought their lands or built their houses. *Taylor v. People*, *supra*; *Wier's Appeal*, 74 Pa. 230; *Brady v. Weeks*, 3 Barb. 157; *Barwell v. Brooks*, 1 Law T. 454. One cannot erect a nuisance upon his land adjoining vacant lands owned by another, and thus measurably control the uses to which his neighbor's land may in the future be subjected. He may make a reasonable and lawful use of his land, and thus cause his neighbor some inconvenience, and probably some damage which the law would regard as *damnum absque injuria*. But he cannot place upon his land anything which the law would pronounce a nuisance, and thus compel his neighbor to leave his land vacant, or to use it in such way only as the neighboring nuisance will allow.

It is claimed that the plaintiffs so far acquiesced in this nuisance as to bar them from any equitable relief. I do not perceive how any acquiescence short of 20 years can bar one from complaining of a nuisance, unless his conduct has been such as to estop him. There is no proof that plaintiffs, when they brought their lands, knew that any one intended to burn any bricks upon the land now owned by defendant. From about 1840 to 1853 no bricks were burned there. Then, from 1853 to 1857, bricks were burned there, and then not again until 1867. From 1857 to 1867 the brick-yard was plowed and used for agricultural purposes. Before suit brought plaintiffs objected to the brick-burning. No act or omission of theirs induced the defendant to incur large expenses, or to take any action which could be the basis of an estoppel against them, and therefore there was no acquiescence or laches which should bar the plaintiffs, within any rule laid down in any reported case.

It is true that if a party sleeps on his rights, and allows a nuisance to go on without remonstrance, or without taking measures, either by suit at law or in equity, to protect his rights, and allows one to go

on making large expenditures about the business which constitutes the nuisance, he will sometimes be regarded as guilty of such laches as to deprive him of equitable relief. But this is not such a case. *Radenhurst v. Coate*, 6 Grant, Ch. 140; *Heenan v. Dewar*, 18 Grant, Ch. 438; *Bankart v. Houghton*, 27 Beav. 425.

The defendant claims a prescriptive right to burn bricks upon his land, and to cause the poisonous vapors to flow over plaintiffs' lands. Assuming that defendant could acquire, by lapse of time and continuous user, the prescriptive right which he claims, there has not here been a continuous use and exercise of the right for 20 consecutive years. Anthracite coal was first used for burning bricks in this yard in 1834, and after six years brick-burning was discontinued. It was not resumed again until about 1853, and after four years it was again discontinued, and it was not resumed again until 1867. So that anthracite coal, which caused plaintiffs' damage, had not been used in all for 20 years, and certainly not continuously in burning bricks upon the yard now owned by defendant. If he could acquire the right claimed by prescription, he, and those under whom he holds, must for 20 years have caused the poisonous gases to flow over plaintiffs' land whenever they burned bricks, and the wind blew from the direction of the kiln. Such a prescription neither the allegations in the answer, nor the proofs upon the trial, nor the findings of the referee, warrant. The referee finds that the premises of defendant have been known and used as a brick-yard for over 25 years. This is not finding that they have been used as a brick-yard for 25 years continuously, or that they have caused the poisonous gases to flow over plaintiffs' land for that length of time continuously. *Ball v. Ray*, L. R. 8 Ch. App. 467; *Parker v. Mitchell*, 11 Adol. & E. 788; *Battishill v. Reed*, 18 C. B. (N. S.) 696; *Fish Co. v. Dudley*, 37 Conn. 136.

Where the damage to one complaining of a nuisance is small or trifling, and the damage to the one causing the nuisance will be large in case he be restrained, the courts will sometimes deny an injunction. But such is not this case. Here the damage to the plaintiffs, as found by the referee, is large and substantial. It does not appear how much damage the defendant will suffer from the restraint of the injunction. He does not own the only piece of ground where bricks can be made. We know that material for brick may exist in all parts of our state, and particularly at various points along the Hudson river. An injunction need not, therefore, destroy defendant's business, or interfere materially with the useful and necessary trade of brick-making. It does not appear how valuable defendant's land is for a brick-yard, nor how expensive are his erections for brick-making. I think we may infer that they are not expensive. For aught that appears, his land may be put to other use just as profitable to him. It does not appear that defendant's damage from an abate-

ment of the nuisance will be as great as plaintiffs' damage from its continuance. Hence this is not a case within any authority to which our attention has been called where an injunction should be denied on account of the serious consequences to the defendant.

We cannot apprehend that our decision in this case can improperly embarrass those engaged in the useful trade of brick-making. Similar decisions in England, where population and human habitations are more dense, do not appear to have produced any embarrassment. In this country there can be no trouble to find places where brick can be made without damage to persons living in the vicinity. It certainly cannot be necessary to make them in the heart of a village or in the midst of a thickly-settled community.

It follows from these views that the judgment should be affirmed. All concur.

Judgment affirmed.

(For excellent definitions of a nuisance, see *Bohan v. Port Jervis Gaslight Co.*, 122 N. Y. 18, 25 N. E. 246, 9 L. R. A. 711; *Lafin Powder Co. v. Tearney*, 131 Ill. 322, 23 N. E. 389, 7 L. R. A. 262, 19 Am. St. Rep. 34. The rule that one "coming to a nuisance" cannot have relief against it is thoroughly exploded. Thus, where manufacturing works were established at a place remote from habitation, and the neighboring city grew to this point, and the owners of adjoining lands built dwellings thereon, it was held that they were entitled to relief if the works were so conducted as to be a nuisance to them. *People v. Detroit White Lead Works*, 82 Mich. 471, 46 N. W. 735, 9 L. R. A. 722; *Wier's Appeal*, 74 Pa. 230; *Susquehanna Fertilizer Co. v. Malone*, 73 Md. 268, 20 Atl. 900, 9 L. R. A. 737, 25 Am. St. Rep. 595; *Van Fossen v. Clark*, 113 Iowa, 86, 84 N. W. 989, 52 L. R. A. 279; *Ducktown Sulphur Co. v. Barnes* [Tenn.] 60 S. W. 593; *Lafin Powder Co. v. Tearney*, 131 Ill. 322, 23 N. E. 389, 7 L. R. A. 262, 19 Am. St. Rep. 34. No prescriptive right can be acquired to maintain a public nuisance. *Driggs v. Phillips*, 103 N. Y. 77, 8 N. E. 514; *Cooley on Torts* [2d Ed.] 730.)

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(11 H. L. Cas. \*642.)

**ST. HELEN'S SMELTING CO. v. TIPPING.**

(House of Lords. July 5, 1865.)

**NUISANCE—WHAT CONSTITUTES—VAPORS FROM USEFUL INDUSTRIES.**

In an action to recover for a nuisance caused by vapors arising from the operation of defendant's smelting works on adjoining premises, the court charged the jury that every man is bound to use his own property in such a manner as not to injure the property of his neighbor, unless, by the lapse of a certain period of time, he has acquired a prescriptive right to do so; that the law does not regard trifling inconveniences; that everything must be looked at from a reasonable point of view; and, therefore, in an action for nuisance to property by noxious vapors arising on the land of another, the injury, to be actionable, must be such as visibly to diminish the value of the property, and the comfort and enjoyment of it; that, in determining that question, the time, locality,

and all the circumstances should be taken into consideration; that, in countries where great works have been erected and carried on which are the means of developing the natural wealth, persons must not stand on extreme rights, and bring actions in respect of every matter of annoyance, as, if that were so, business could not be carried on in these places. The court refused to hold that the questions which ought to be submitted to the jury were "whether it was a necessary trade, whether the place was a suitable place for such a trade, and whether it was carried on in a reasonable manner." *Held*, not erroneous.

#### Appeal from Exchequer Chamber.

Action by William Tipping against the St. Helen's Copper Smelting Company, Limited, for a nuisance to plaintiff's dwelling-house and premises caused by noxious vapors proceeding from smelting works owned and operated by defendant on adjoining lands, which destroyed plaintiff's trees and foliage, injured his cattle, and were detrimental to his health. At the trial in the court of queen's bench, before Mellor, J., defendant's counsel contended that the three questions which ought to be submitted to the jury were "whether it was a necessary trade, whether the place was a suitable place for such a trade, and whether it was carried on in a reasonable manner." The court refused so to hold, but charged the jury that every man is bound to use his own property in such a manner as not to injure the property of his neighbor, unless, by the lapse of a certain period of time, he has acquired a prescriptive right to do so; that the law does not regard trifling inconveniences; that everything must be looked at from a reasonable point of view; and therefore, in an action for nuisance to property by noxious vapors arising on the land of another, the injury, to be actionable, must be such as visibly to diminish the value of the property and the comfort and enjoyment of it; that, in determining that question, the time, locality, and all the circumstances should be taken into consideration; that, in countries where great works have been erected and carried on which are the means of developing the natural wealth, persons must not stand on extreme rights, and bring actions in respect of every matter of annoyance, as, if that were so, business could not be carried on in those places. The jury found specially that the enjoyment of plaintiff's property was sensibly diminished; that the business carried on by defendant was the ordinary business of smelting copper, and conducted in a proper manner, in as good a manner as possible; and that it was carried on in a proper place; and found a verdict for plaintiff for £361 damages. Defendant moved for a new trial, which was refused. 4 Best & S. 608. The judgment of the queen's bench was affirmed by the exchequer chamber, and from that judgment defendant appealed.

MARTIN, B. In answer to the questions proposed by your lordships to the judges, I have to state their unanimous opinion that the directions given by the learned judge to the jury are correct, and that a new trial ought not to be granted. As far as the experience of all of

us goes, the directions are such as we have given in these cases for the last 20 years.

THE LORD CHANCELLOR. My lords, I think your lordships will be satisfied with the answer we have received from the learned judges to the question put by this house. My lords, in matters of this description, it appears to me that it is a very desirable thing to mark the difference between an action brought for a nuisance upon the ground that the alleged nuisance produces material injury to the property, and an action brought for a nuisance on the ground that the thing alleged to be a nuisance is productive of sensible personal discomfort. With regard to the latter, namely, the personal convenience, an interference with one's enjoyment, one's quiet, one's personal freedom, anything that discomposes or injuriously affects the senses or the nerves, whether that may or may not be denominated a "nuisance," must undoubtedly depend greatly on the circumstances of the place where the thing complained of actually occurs. If a man lives in a town, it is necessary that he should subject himself to the consequences of those operations of trade which may be carried on in his immediate locality, which are actually necessary for trade and commerce, and also for the enjoyment of property and for the benefit of the inhabitants of the town and of the public at large. If a man lives in a street where there are numerous shops, and a shop is opened next door to him, which is carried on in a fair and reasonable way, he has no ground for complaint because to himself individually there may arise much discomfort from the trade carried on in that shop; but when an occupation is carried on by one person in the neighborhood of another, and the result of that trade or occupation or business is a material injury to property, then there unquestionably arises a very different consideration. I think, my lords, that, in a case of that description, the submission which is required from persons living in society to that amount of discomfort which may be necessary for the legitimate and free exercise of the trade of their neighbors would not apply to circumstances the immediate result of which is sensible injury to the value of the property. Now, in the present case, it appears that the plaintiff purchased a very valuable estate, which lies within a mile and a half from certain large smelting works. What the occupation of these copper smelting premises was anterior to the year 1860 does not clearly appear. The plaintiff became the proprietor of an estate of great value in the month of June, 1860. In the month of September, 1860, very extensive smelting operations began on the property of the present appellant,—the works at St. Helen's. Of the effect of the vapors exhaling from those works upon the plaintiff's property, and the injury done to the trees and shrubs, there is abundance of evidence in the case. My lords, the action has been brought upon that; the jurors have found the existence of the injury; and the only ground upon which your lordships are asked to set

aside that verdict, and to direct a new trial, is this: That the whole neighborhood where these copper smelting works were carried on is a neighborhood more or less devoted to manufacturing purposes, of a similar kind, and therefore it is said that, inasmuch as this copper smelting is carried on in what the appellant contends is a fit place, it may be carried on with impunity, although the result may be the utter destruction or the very considerable diminution of the value of the plaintiff's property. My lords, I apprehend that that is not the meaning of the word "suitable," or the meaning of the word "convenient," which has been used as applicable to the subject. The word "suitable" unquestionably cannot carry with it this consequence,—that a trade may be carried on in a particular locality, the consequence of which trade may be the injury and destruction to the neighboring property. Of course, my lords, I except cases where any prescriptive right has been acquired by a lengthened user of the place. On these grounds, therefore, shortly, without dilating further upon them, (and they are sufficiently unfolded by the judgment of the learned judges in the court below,) I advise your lordships to affirm the decision of the court below, and to refuse the new trial, and to dismiss the appeal, with costs.

LORD CRANWORTH. My lords, I entirely concur in opinion with my noble and learned friend on the woolsack, and also in the opinion expressed by the learned judges that this has been considered to be the proper mode of directing a jury, as Mr. Baron Martin said, for at least 20 years. I believe I should have carried it back rather further. In stating what I always understood the proper question to be, I cannot do better than adopt the language of Mr. Justice Mellor. He says: "It must be plain that persons using a lime-kiln or other works, which emit noxious vapors, may not do an actionable injury to another; and that any place, where such an operation is carried on so that it does occasion an actionable injury to another, is not, in the meaning of the law, a convenient place." I always understood that to be so; but in truth, as was observed in one of the cases by the learned judges, it is extremely difficult to lay down any actual definition of what constitutes an injury, because it is always a question of compound facts, which must be looked to, to see whether or not the mode of carrying on a business did or did not occasion so serious an injury as to interfere with the comforts of life and enjoyment of property. I perfectly well remember, when I had the honor of being one of the barons of the court of exchequer, trying a case in the county of Durham, where there was an action for injury arising from smoke in the town of Shields. It was proved incontestably that smoke did come, and in some degree interfere with a certain person, but I said: "You must look at it, not with a view to the question whether, abstractedly, that quantity of smoke was a nuisance, but whether it was a nuisance to a person living in the town of Shields;" because, if it only added in an infinitesimal degree to

the quantity of smoke, I thought that the state of the town rendered it altogether impossible to call that an actionable nuisance. There is nothing of that sort in the present case. It seems to me that the distinction, in matter of fact, was most correctly pointed out by Mr. Justice Mellor, and I do not think he could possibly have stated the law, either abstractedly, or with reference to the facts, better than he has done in this case.

LORD WENSLEYDALE. My lords, I entirely agree in opinion with both my noble and learned friends in this case. In these few sentences I think everything is included: The defendants say, "If you do not mind, you will stop the progress of works of this description." I agree that that is so, because, no doubt, in the county of Lancaster, above all other counties, where great works have been created and carried on, and are the means of developing the national wealth, you must not stand on extreme rights, and allow a person to say, "I will bring an action against you for this and that and so on." Business could not go on if that were so. Everything must be looked to from a reasonable point of view. Therefore the law does not regard trifling and small inconveniences, but only regards sensible inconveniences,—injuries which sensibly diminish the comfort, enjoyment, or value of the property which is affected. My lords, I do not think the question could have been more correctly laid down by any one to the jury, and I entirely concur in the propriety of dismissing this appeal.

Appeal dismissed, with costs.

(This case is followed in *Hennessy v. Carmony*, 50 N. J. Eq. 616, 25 Atl. 374; *Susquehanna Fertilizer Co. v. Malone*, 73 Md. 268, 20 Atl. 900, 9 L. R. A. 737, 25 Am. St. Rep. 595; *McKeon v. See*, 51 N. Y. 300, 10 Am. Rep. 659; *Ducktown Sulphur Co. v. Barnes* [Tenn.] 60 S. W. 593. The location of an alleged nuisance is always to be taken into consideration. What would be a nuisance in one place would be perfectly legitimate in another. *Demarest v. Hardham*, 34 N. J. Eq. 469; *Eller v. Koehler* [Ohio] 67 N. E. 89; *Comm. v. Miller*, 139 Pa. 77, 21 Atl. 138, 23 Am. St. Rep. 170.)

## II. EXAMPLES OF NUISANCES.

### 1. Drainage of surface waters.

(86 N. Y. 140, 40 Am. Rep. 519.)

BARKLEY v. WILCOX.

(Court of Appeals of New York. Oct. 4, 1881.)

#### SURFACE WATERS—OBSTRUCTING.

The owner of land, which is so situated that the surface waters from the land above naturally descend upon and pass over it, may in good faith, and for the purpose of building upon and improving his land, fill and grade it, although thereby the water is prevented from reaching it, and is detained upon the land above.

Appeal from Supreme Court, General Term, Second Department.

Action by Alfred Barkley against Nelson Wilcox to recover damages for injuries alleged to have been sustained by the obstruction of the natural flow of surface water from plaintiff's lot over and across that of defendant. The case was submitted to a referee, who reported in favor of defendant, and the judgment entered thereon was affirmed by the general term. 19 Hun, 320. From the judgment of the general term plaintiff appealed.

ANDREWS, J. This is not the case of a natural water-course. A natural water-course is a natural stream, flowing in a defined bed or channel, with banks and sides, having permanent sources of supply. It is not essential to constitute a water-course that the flow should be uniform or uninterrupted. The other elements existing, a stream does not lose the character of a natural water-course because, in times of drought, the flow may be diminished, or temporarily suspended. It is sufficient if it is usually a stream of running water. Ang. Water-Courses, § 4; Luther v. Winnisimmet Co., 9 Cush. 171.

The parties in this case own adjacent lots on a street near a village, but not within the corporate limits. The findings are that the natural formation of the land was such that surface water from rains and melting snows would descend from different directions and accumulate in the street in front of the plaintiff's lot, in varying quantities according to the nature of the seasons, sometimes extending quite back upon plaintiff's lot; that in times of unusual amount of rain, or thawing snow, such accumulations, before the grading of the defendant's lot, were accustomed to run off over a natural depression in the surface of the land, across the defendant's lot, and thence over the lands of others, to the Neversink river; that when the amount of water was small, it would soak away in the ground; that in 1871 the defendant built a house on his lot, and used the earth excavated in digging the cellar to

improve and better the condition of his lot, by grading and filling up the lot, and sidewalk in front of it, about 12 inches, and on a subsequent occasion he filled in several inches more; that in the spring of 1875 there was an unusually large accumulation of water from melting snow and rains in front of and about the plaintiff's premises, so that the water ran into the cellar of his house, and occasioned serious damage; that the filling in of the defendant's lot had the effect to increase the accumulation of water on the plaintiff's lot, and contributed to the injury to his property.

There was no natural water-course over the defendant's lot. The surface water, by reason of the natural features of the ground, and the force of gravity, when it accumulated beyond a certain amount in front of the plaintiff's lot, passed upon and over the lot of the defendant. The discharge was not constant or usual, but occasional only. There was no "channel" or "stream," in the usual sense of those terms. In an undulating country, there must always be valleys and depressions, to which water, from rains or snow, will find its way from the hill-sides, and be finally discharged into some natural outlet. But this does not constitute such valleys or depressions water-courses. Whether, when the premises of adjoining owners are so situated that surface water falling upon one tenement naturally descends to and passes over the other, the incidents of a water-course apply to and govern the rights of the respective parties, so that the owner of the lower tenement may not, even in good faith and for the purpose of improving or building upon his own land, obstruct the flow of such water to the injury of the owner above, is the question to be determined in this case. This question does not seem to have been authoritatively decided in this state. It was referred to by Denio, C. J., in *Goodale v. Tuttle*, 29 N. Y. 467, where he said: "And, in respect to the running off of surface water caused by rain or snow, I know of no principle which will prevent the owner of the land from filling up the wet and marshy places on his own soil, for its amelioration and his own advantage, because his neighbor's land is so situated as to be incommoded by it. Such a doctrine would militate against the well-settled rule that the owner of land has full dominion over the whole space above and below the surface." The case in which these observations were made did not call for the decision of the question, but they show the opinion of a great judge upon the point now in judgment. Similar views have been expressed in subsequent cases in this court, although in none of them, it seems, was the question before the court for decision. *Vanderwiele v. Taylor*, 65 N. Y. 341; *Lynch v. Mayor, etc.*, 76 N. Y. 60, 32 Am. Rep. 271. The question has been considered by courts in other states, and has been decided in different ways. In some the doctrine of the civil law has been adopted as a rule of decision. By that law, the right of drainage of surface water, as between owners of adjacent lands, of different elevations, is governed by the law of nature. The lower proprietor is

bound to receive the waters which naturally flow from the estate above, provided the industry of man has not created or increased the servitude. Corp. Jur. Civ. 39, tit. 3, §§ 2-5; Domat, (Cush. Ed.) 616; Code Nap. art. 640; Code La. art. 656. The courts of Pennsylvania, Illinois, California, and Louisiana have adopted this rule, and it has been referred to with approval by the courts of Ohio and Missouri. *Martin v. Riddle*, 26 Pa. 415; *Kauffman v. Griesemer*, Id. 407, 67 Am. Dec. 437; *Gillham v. Railroad Co.*, 49 Ill. 484, 95 Am. Dec. 627; *Gormley v. Sanford*, 52 Ill. 158; *Ogburn v. Connor*, 46 Cal. 346, 13 Am. Rep. 213; *Dela-houssaye v. Judice*, 13 La. Ann. 587, 71 Am. Dec. 521; *Hays v. Hays*, 19 La. 351; *Butler v. Peck*, 16 Ohio St. 334, 88 Am. Dec. 452; *Lau-mier v. Francis*, 23 Mo. 181. On the other hand, the courts of Massa-chusetts, New Jersey, New Hampshire, and Wisconsin have rejected the doctrine of the civil law, and hold that the relation of dominant and servient tenements does not, by the common law, apply between adjoining lands of different owners, so as to give the upper proprietor the legal right, as an incident of his estate, to have the surface water falling on his land discharged over the land of the lower proprietor, although it naturally finds its way there; and that the lower proprietor may lawfully, for the improvement of his estate and in the course of good husbandry, or to make erections thereon, fill up the low places on his land, although by so doing he obstructs or prevents the surface water from passing thereon from the premises above to the injury of the upper proprietor. *Luther v. Winnisimmet Co.*, 9 Cush. 171; *Parks v. Newburyport*, 10 Gray, 28; *Dickinson v. Worcester*, 7 Allen, 19; *Gannon v. Hargadon*, 10 Allen, 106, 87 Am. Dec. 625; *Bowlsby v. Speer*, 31 N. J. Law, 351, 86 Am. Dec. 216; *Pettigrew v. Evansville*, 25 Wis. 223, 3 Am. Rep. 50; *Hoyt v. Hudson*, 27 Wis. 656, 9 Am. Rep. 473; *Swett v. Cutts*, 50 N. H. 439, 9 Am. Rep. 276. It may be observed that in Pennsylvania house-lots in towns and cities seem to be regarded as not subject to the rule declared in the other cases in that state in respect to surface drainage. *Bentz v. Armstrong*, 8 Watts & S. 40, 42 Am. Dec. 265. And in *Livingston v. McDonald*, 21 Iowa, 160, 89 Am. Dec. 563, the court, in an opinion by Dillon, J., after stating the civil-law doctrine, say that it may be doubted whether it will be adopted by the common-law courts of this country, so far as to preclude the lower owner from making, in good faith, improvements which would have the effect to prevent the water of the upper estate from flowing or passing away. Professor Washburn states that the prevailing doctrine seems to be that if, for the purposes of improving and cultivating his land, a land-owner raises or fills it, so that the water which falls in rain or snow upon an adjacent owner's land, and which formerly flowed onto the first-mentioned parcel, is prevented from so doing, to the injury of the adjacent parcel, the owner of the latter is without remedy, since the other party has done no more than he had a legal right to do. Washb. Easem. (2d Ed.) 431.

Upon this state of the authorities, we are at liberty to adopt such rule on the subject as we may deem most consonant with the demands of justice, having in view, on the one hand, individual rights, and on the other the interests of society at large. Upon consideration of the question, we are of opinion that the rule stated by Denio, C. J., in *Goodale v. Tuttle*, is the one best adapted to our condition, and accords with public policy; while, at the same time, it does not deprive the owner of the upper tenement of any legal right of property. The maxim, *aqua currit, et debet currere, ut currere solebat*, expresses the general law which governs the rights of owners of property on water-courses. The owners of land on a water-course are not owners of the water which flows in it. But each owner is entitled, by virtue of his ownership of the soil, to the reasonable use of the water, as it passes his premises, for domestic and other uses, not inconsistent with a like reasonable use of the stream by owners above and below him. Such use is incident to his right of property in the soil. But he cannot divert, or unreasonably obstruct, the passage of the water, to the injury of other proprietors. These familiar principles are founded upon the most obvious dictates of natural justice and public policy. The existence of streams is a permanent provision of nature, open to observation by every purchaser of land through which they pass. The multiplied uses to which in civilized society the water of rivers and streams is applied, and the wide injury which may result from an unreasonable interference with the order of nature, forbid an exclusive appropriation by an individual of the water in a natural water-course, or any unreasonable interruption in the flow. It is said that the same principle of following the order of nature should be applied between coterminous proprietors, in determining the right of mere surface drainage. But it is to be observed that the law has always recognized a wide distinction between the right of an owner to deal with surface water falling or collecting on his land and his right in the water of a natural water-course. In such water, before it leaves his land and becomes a part of a definite water-course, the owner of the land is deemed to have an absolute property, and he may appropriate it to his exclusive use, or get rid of it in any way he can, provided only that he does not cast it, by drains or ditches, upon the land of his neighbor; and he may do this, although by so doing he prevents the water reaching a natural water-course, as it formerly did, thereby occasioning injury to mill-owners or other proprietors on the stream. So, also, he may, by digging on his own land, intercept the percolating waters which supply his neighbor's spring. Such consequential injury gives no right of action. *Acton v. Blundell*, 12 Mees. & W. 324; *Rawstron v. Taylor*, 11 Exch. 369; *Phelps v. Nowlen*, 72 N. Y. 39, 28 Am. Rep. 93. Now, in these cases there is an interference with natural laws. But those laws are to be construed in connection with social laws and the laws of property. The interference in these cases with natural laws is justified, because the general law of society

is that the owner of land has full dominion over what is above, upon, or below the surface, and the owner, in doing the acts supposed, is exercising merely a legal right. The owner of wet and spongy land cannot, it is true, by draining or other artificial means, collect the surface water into channels, and discharge it upon the land of his neighbor, to his injury. This is alike the rule of the civil and common law. Corp. Jur. Civ. 39, tit. 3, §§ 2, 3, 4, 5; *Noonan v. City of Albany*, 79 N. Y. 475, 35 Am. Rep. 540; *Miller v. Laubach*, 47 Pa. 154, 86 Am. Dec. 521. But it does not follow, we think, that the owner of land which is so situated that the surface water from the lands above naturally descends upon and passes over it may not, in good faith, and for the purpose of building upon or improving his land, fill or grade it, although thereby the water is prevented from reaching it, and is retained upon the lands above. There is a manifest distinction between casting water upon another's land and preventing the flow of surface water upon your own. Society has an interest in the cultivation and improvement of lands, and in the reclamation of waste lands. It is also for the public interest that improvements shall be made, and that towns and cities shall be built. To adopt the principle that the law of nature must be observed, in respect to surface drainage, would, we think, place undue restriction upon industry and enterprise, and the control by an owner of his property. Of course, in some cases, the opposite principle may cause injury to the upper proprietor. But the question should, we think, be determined largely upon considerations of public policy and general utility. Which rule will, on the whole, best subserve the public interests, and is most reasonable in practice?

For the reasons stated, we think the rule of the civil law should not be adopted in this state. The case before us is an illustration of the impolicy of following it. Several house-lots (substantially village lots) are crossed by the depression. They must remain unimproved if the right claimed by the plaintiff exists. It is better, we think, to establish a rule which will permit the reclamation and improvement of low and waste lands to one which will impose upon them a perpetual servitude, for the purpose of drainage, for the benefit of upper proprietors. We do not intend to say that there may not be cases which, owing to special conditions and circumstances, should be exceptions to the general rule declared. But this case is within it, and we think the judgment below should be affirmed. All concur.

Judgment affirmed.

(The common-law rule has been well expressed as follows: "Surface water is a common enemy which every proprietor may fight and get rid of as best he may; but he must so do it as not unnecessarily or unreasonably to injure his neighbor." *Jessup v. Bamford Bros. Co.*, 66 N. J. Law, 641, 51 Atl. 147, 58 L. R. A. 329, 88 Am. St. Rep. 502; *Sheehan v. Flynn*, 59 Minn. 436, 61 N. W. 462, 26 L. R. A. 632. For cases in support of this doctrine, in addition to those cited in the principal case, see *Id.*; *Morrison v. Bucksport & B. R. Co.*, 67 Me. 353; *Franklin v. Durgee*, 71 N. H. 186, 51 Atl. 911, 58

L. R. A. 112; *Rathke v. Gardner*, 134 Mass. 14; *Byrne v. Farmington*, 64 Conn. 367, 30 Atl. 138; *Mo. Pac. R. Co. v. Keys*, 55 Kan. 205, 40 Pac. 275, 49 Am. St. Rep. 249; *Peck v. Goodberlett*, 109 N. Y. 180, 16 N. E. 350. For the contrasted or so-called civil law rule, see *Peck v. Herrington*, 109 Ill. 611, 50 Am. Rep. 627; *Garland v. Aurin*, 103 Tenn. 555, 53 S. W. 940, 48 L. R. A. 862, 76 Am. St. Rep. 699, and cases cited; *Leidlein v. Meyer*, 95 Mich. 586, 55 N. W. 367; cf. *Sanguinetti v. Pock*, 136 Cal. 466, 69 Pac. 98, 89 Am. St. Rep. 169; *City of Waverly v. Page*, 105 Iowa, 225, 74 N. W. 938, 40 L. R. A. 465. The Supreme Court of the United States, in cases coming before it from the different states, follows the decisions of the local state courts, though this may involve apparently contradictory decisions. *Walker v. New Mexico & S. P. R. Co.*, 165 U. S. 593, 17 Sup. Ct. 421, 41 L. Ed. 837.)

## 2. Diversion and detention of stream.

(46 N. Y. 511, 7 Am. Rep. 373.)

CLINTON v. MYERS.

(Court of Appeals of New York. Nov. 28, 1871.)

### 1. WATER-COURSES—DETENTION OF STREAM.

As against a lower riparian owner, a person has no legal right to detain, by means of a storage dam erected upon his land, such surplus waters of a natural water-course crossing his lands as he may not require for present use until they may be wanted by him in a dry season.

### 2. SAME—INJUNCTION.

The fact that such storage makes the lower riparian owner's rights more valuable is immaterial if he insists upon his legal right to the water as it would naturally flow, and such right is of any value to him. Nor will a court of equity inquire as to his motive in insisting on his legal rights.

Appeal from Supreme Court, General Term, Sixth Judicial District.

Action by William M. Clinton against Charles P. Myers to restrain defendant from opening the gate of plaintiff's dam, and letting off the accumulated waters. Plaintiff owned the land forming the boundaries of a natural pond and its outlet. The pond was formed by springs and by surface waters running therein in rainy seasons and from melting snows. Plaintiff owned a cotton factory some three miles below this pond, which was run most of the year by water from other sources, and he constructed a dam across the outlet of the pond to store the waters for use in the dry seasons when his other supply was inadequate to run his mill. Defendant owned a large farm between the pond and plaintiff's factory, lying upon both sides of the stream from the pond, upon which stream he had a water-power and saw-mill. This action was brought to restrain the threatened interference with the gates of plaintiff's dam to let off the waters of the pond. The court awarded an injunction. Defendant appealed.

GROVER, J. The judgment restraining the defendant from interfering with the gate and other structures of the plaintiff at the outlet of the pond can be sustained only in case the plaintiff has the right to maintain the dam and other structures, and thereby control the flow of the water in the manner and for the purposes found by the special term for which it was controlled by him; and for effecting which, the structures were erected. From these facts it appears that the dam and structures were erected at the outlet of a natural pond of about 40 acres, into which one or more small streams run, having but a small quantity of water in a dry time flowing therein. But in the wet seasons—spring and fall—a much larger quantity flowed into and out of the pond. That the dam was constructed about 10 feet above the natural outlet of the pond, and used to detain the water in the pond during such portions of the year as the plaintiff's factory was adequately supplied with water from a stream below the dam, (the latter a stream originating from another source.) And when this failed to furnish an adequate supply, the deficiency was supplied from the reservoir, in a steady and constant manner, through a gate in a trunk of about a foot square. That the waters have been retained and used by the plaintiff with the sole view of economizing and utilizing the same to the greatest possible extent, not viciously, or with any intent to injure, or in any way wrong the defendant. It further appears from such finding that the water was so detained by the plaintiff during the wet seasons in the spring and fall, until wanted for use by the plaintiff in the dry seasons of winter and summer. The judgment, in effect, determines that the plaintiff has a right so to detain and use the water, it being necessary so to do, to give an adequate and profitable power to propel the machinery of a factory owned by him, situate about three miles below the outlet, as against the defendant. The defendant is the owner of a parcel of land situated upon both sides of the stream between the outlet and the plaintiff's factory, upon which there is a saw-mill operated by the defendant during portions of the year. The question to be determined is of great importance to the plaintiff, the case showing that his factory is of great value, which will be much impaired, if not wholly destroyed, by not enjoying the right to control and use the water in the manner claimed by him in this action. While this consideration should induce care in the examination of the case, it can have no weight in the determination of the legal rights of the parties. It is the duty of the court to apply the law as it is to the facts of every case, and give to every party his legal rights, irrespective of any hardship that may be thereby caused in any special case. It is necessary to examine the question as to the rights of riparian owners, as the judgment for the plaintiff, to its full extent, depends wholly upon those rights.

Kent (3 Comm. 439) says that every proprietor of lands on the banks of a river has naturally an equal right to the use of water which flows in the stream adjacent to his lands, as it was wont to run, (*currere sole-*

bat,) without diminution or alteration. No proprietor has a right to use the water, to the prejudice of other proprietors above or below him, unless he has a prior right to divert it, or a title to some exclusive enjoyment. He has no property in the water itself, but a simple usufruct while it passes along. "*Aqua currit, et debet currere, ut currere solebat,*" is the language of the law. Though he may use the water while it runs over his land as an incident to the land, he cannot unreasonably detain it or give it another direction, and he must return it to its ordinary channel when it leaves his estate. In *Tyler v. Wilkinson*, 4 Mason, 397, Fed. Cas. No. 14,312, Judge Story, after a thorough examination of the authorities, says that every proprietor upon each bank of a river is entitled to the land covered with water in front of his bank to the middle thread of the stream, etc. In virtue of this ownership, he has a right to the use of the water flowing over it in its natural current, without diminution or obstruction. But, strictly speaking, he has no property in the water itself, but a simple use of it while it passes along. The consequence of this principle is that no proprietor has a right to use the water to the prejudice of another. It is wholly immaterial whether the party be a proprietor above or below in the course of a river. The right being common to all the proprietors on the river, no one has a right to diminish the quantity which will, according to the natural current, flow to a proprietor below, or to throw it back upon a proprietor above. This is the necessary result of the perfect equality of right among all the proprietors of that which is common to all. The natural stream existing by the bounty of Providence for the benefit of the land through which it flows, is an incident annexed by operation of law to the land itself. When I speak of this common right, I do not mean to be understood as holding the doctrine that there can be no diminution whatsoever, and no obstruction or impediment whatsoever, by a riparian proprietor, in the use of the water as it flows; for that would be to deny any valuable use of it. There may be and there must be allowed, of that which is common to all, a reasonable use. The true test of the principle and extent of the use is whether it is to the injury of the other proprietors or not. There may be a diminution in quantity, or retardation or acceleration of the natural current, indispensable for the general and valuable use of the water, properly consistent with the existence of the common right. The diminution, retardation, or acceleration, not positively or sensibly injurious, by diminishing the value of the common right, is an implied element in the right of using the stream at all. The law here, as in many other cases, acts with a reasonable reference to public convenience and general good, and is not betrayed into a narrow strictness, subversive of common sense, nor into extravagant looseness, which would destroy private rights. A water-course begins *ex jure naturæ*, and, having taken a certain course naturally, cannot be diverted. "*Aqua currit, et debet currere, ut currere solebat,*" is also the language of the ancient common law.

That is, the water runs naturally, and should be permitted thus to run, so that all through whose lands it runs may enjoy the privilege of using it. Ang. Water-Courses, § 93. This is sustained by numerous judicial decisions and all elementary writers upon the subject.

How far the natural flow of the stream may be interfered with by a riparian owner, to enable such owner to utilize the stream, for the purpose of propelling machinery, has frequently been the subject of judicial examination. *Gould v. Duck Co.*, 13 Gray, 443, may be regarded as a leading case upon this point. In this case the defendant had built a substantial dam upon the stream, and drew the water to its factory by means of a canal, and, after using the same, returned it to its natural channel before it reached the plaintiff's land. The stream, at ordinary stages of water, afforded an ample supply for the defendant's factory; but in seasons of great drought the defendant was unable to operate its factory during all the usual working hours of each day, but was obliged, in order to create the requisite head and supply of water, to shut its gates earlier than usual on some days, and sometimes for an entire day, and thus arrest the usual flow of the water. This was the injury complained of by the plaintiff, who was the owner of a mill upon the stream directly below the dam, and who was injured, to some extent, by being deprived of the use of the water while the natural flow was thus arrested. The court held that this use of the water by the defendant was not unreasonable, and that, if such use did at times interfere with the use which the plaintiff might have made of the water, it was "*damnum absque injuria*." The doctrine of this case simply is, that a party has a right to erect a dam across a stream upon his land, and such machinery as the stream, in its ordinary stages, is adequate to propel; and, if the stream in seasons of drought becomes inadequate for that purpose, he has a right to detain the water for such reasonable time as may be necessary to raise the requisite head, and accumulate such a quantity as will enable him to use the water for the purpose of his machinery. I think this is the correct legal rule by which to determine the rights of riparian owners. This will enable each owner to make an advantageous use of the water. The machinery must be such as the power of the stream, in its ordinary stages, is adequate to propel. The water in times of drought may be detained for such a length of time only as is necessary to enable it to be advantageously and profitably used upon such machinery. If so used the accumulation will be discharged in quantities not beyond the usual flow of the stream. This will enable every owner in seasons of drought, when unable to use the water at all as then naturally flowing, to operate his machinery to some extent by retaining the water so as to raise a proper head, and such quantity as to enable him to use the same. By so doing, he is not liable to an action by an owner below, whose machinery does not require for its operation all the water at an ordinary stage, but only such as naturally flows during seasons of drought, though to some extent

injured by being deprived of the natural flow. But the machinery must be adapted to the power of the stream at its usual stage. An owner has no right to erect machinery requiring for its operation more water than the stream furnishes at an ordinary stage, and operate such machinery by ponds full, discharging upon those below in unusual quantities, by means of which the latter are unable to use it. *Merritt v. Brinkerhoff*, 17 Johns. 306, 8 Am. Dec. 404. In *Pitts v. Lancaster Mills*, 13 Metc. (Mass.) 156, it was held that an owner had a right to construct a dam and detain the water long enough to raise a head by filling it, permitting it then to resume its natural flow. In *Brace v. Yale*, 10 Allen, 441, it was held that the erection of a reservoir dam upon a small stream, thereby detaining and storing up the water until the owner of the dam desired to use it, and drawing from the pond and using it when he had occasion, was a user of the stream adverse to the rights of the owners below, and, if continued for a sufficient length of time, refined into a right. This, in effect, is an adjudication that an owner has not a right to create a reservoir and store the water therein for future use, and that by so doing he violates the rights of the owners below, for the preservation of which the law will afford a remedy.

The plaintiff cites *Hoy v. Sterrett*, 2 Watts, 327, 27 Am. Dec. 313; *Hetrich v. Deachler*, 6 Pa. 32; and *Hartzall v. Sill*, 12 Pa. 248,—as sustaining the right to store the water for future use claimed by the plaintiff. *Hetrich v. Deachler* simply holds that the reasonableness of the detention of water by the owner above to the injury of the owner below, depending as it must on the nature and size of the stream as well as the business to which it was subservient, was a question of fact for the jury, it being impossible to make any general rule. *Hoy v. Sterrett*, so far as the questions involved have any bearing upon the present case, is the same as *Hetrich v. Deachler*. In *Hartzall v. Sill*, 12 Pa. 248, it was held that the proprietor of a mill above had the right to detain the water long enough for the proper use of his mill; and, if by so doing the owner below was injured, it was “damnum absque injuria;” and whether longer detained than necessary was a question of fact for the jury. This is an entirely different question from that involved in the present case,—that is, whether, when the stream furnishes more water than is necessary to run a mill, the owner has a right, by means of a reservoir dam, to store up such surplus water and detain it until he shall want it for use in a dry season. *Whaler v. Ahl*, 29 Pa. 98, is in conflict with the law of this state. In this case the defendant had erected machinery that the usual quantity of water in the stream was inadequate to propel. It was held that he might erect a dam, accumulate the water, and with such accumulation run his machinery, discharging the water in unusual quantities upon the owner below. This is in direct conflict with *Merritt v. Brinkerhoff*, 17 Johns. 320, 8 Am. Dec. 404. This right, claimed by the plaintiff, to detain such surplus water of the stream as he may not require for present use

until wanted in a dry season, has no foundation in the law, and is in direct conflict with the maxim, *aqua currit*, etc., *supra*.

But it is insisted that this detention does no material injury to the defendant, but that, on the contrary, his power is made more valuable by this use of the water. The answer to this is that he must be the judge whether he will accept of any such benefit. He is entitled to the water and to its use for sawing in the spring, according to the natural flow, and is not obliged to accept and use it for that or any other purpose during the drought of summer. Again, it is said, and the fact is so found by the special term, that the defendant insists upon his right to the natural flow of the water in the stream from a bad motive, and for the purpose of annoying the plaintiff. This is immaterial. Courts have no power to deny to a party his legal right because it disapproves his motives for insisting upon it. The use of the water by the plaintiff, to the extent awarded by the judgment, and protected by the injunction, has not continued 20 years. The plaintiff has acquired no right by prescription. Whether he has any such a right to detain the water by a five-feet dam, as held by the court below, is a grave question upon the evidence; but, as its determination is not necessary, and as the evidence may be different upon another trial, I shall not examine or pass upon it. The counsel for the plaintiff cites from the opinion of Woodruff, J., in *Corning v. Nail Factory*, 40 N. Y. 220, the proposition that, if it was clear that the restoration of the water was of no value to the plaintiff, the case would not call for equitable interference. Assuming this to be correct, it has no application to the present case. It may be true that equity will not interfere to secure to a party a legal right of no value to him, but leave him to his remedy at law. But interfering to restrain him from enforcing such a right on the ground that it is of no value, is quite another affair. That is the present case. That equity will not restrain a party from enforcing his legal right upon any such ground is too clear for discussion. There was nothing in the evidence or finding showing that the defendant was estopped from asserting his right to the natural flow of the water. The judgment appealed from must be reversed, and a new trial ordered; costs to be determined by the court in the decision of the case. All concur, except PECKHAM, J., not voting.

Judgment reversed.

(See also *Strobel v. Kerr Salt Co.*, 164 N. Y. 303, 58 N. E. 142, 51 L. R. A. 687, 79 Am. St. Rep. 643 [a valuable decision]; *Colrick v. Swinburne*, 105 N. Y. 503, 12 N. E. 427 [diversion of a spring]; *Bullard v. Saratoga Co.*, 77 N. Y. 525; *Messinger's Appeal*, 109 Pa. 285, 4 Atl. 162; *Moulton v. Water Co.*, 137 Mass. 163; *Embrey v. Owen*, 6 Exch. 353; *Davis v. Getchell*, 50 Me. 602, 79 Am. Dec. 636.)

### 3. Pollution of water.

(13 Allen, 16, 90 Am. Dec. 172.)

MERRIFIELD v. LOMBARD.

(Supreme Judicial Court of Massachusetts. Oct. Term, 1866.)

#### WATER-COURSES—POLLUTION OF STREAM.

The pollution of a stream of water, so as to prevent the use of it for any of the reasonable and proper purposes to which running water is usually applied, such as irrigation, the propulsion of machinery, or consumption for domestic use, is an infringement of the rights of other riparian owners, and creates a nuisance for which those thereby injured are entitled to a remedy. Permitting poisonous and corrosive substances to run into the stream, which corrode and destroy the machinery of a lower proprietor, will be enjoined.

Case reserved.

Bill in equity by William T. Merrifield against Nathan A. Lombard for an injunction to restrain defendant from throwing vitriol and other noxious substances in a natural water-course, which so corrupted the water that it corroded, injured, and destroyed plaintiff's engine and boilers used in his factory. The parties were riparian owners on the same stream. Defendant had used the stream for more than 20 years, but the injurious effects of the substances thrown in the stream had not become apparent save in the last 8 years before the suit was brought. At the trial the case was reserved by the judge for the supreme court.

BIGELOW, C. J. The case, as made by the bill, answer, and agreed facts, establishes a clear invasion of the plaintiff's right by the defendant. The law requires of a party through whose land a natural water-course passes that he should use the water in such manner as not to destroy, impair, or materially affect the beneficial appropriation of it by the proprietors of land below on the same stream. Each riparian owner has the right to use the water for any reasonable and proper purpose, as it flows through his land, subject to the restriction that he shall not thereby deprive others of a like use and enjoyment of the stream as it runs through their land. Any diversion or obstruction of the water which substantially diminishes the volume of the stream, so that it does not flow *ut currere solebat*, or which defiles and corrupts it to such a degree as essentially to impair its purity and prevent the use of it for any of the reasonable and proper purposes to which running water is usually applied, such as irrigation, the propulsion of machinery, or consumption for domestic use, is an infringement of the right of other owners of land through which a water-course runs, and creates a nuisance for which those thereby injured are entitled to a remedy. An injury to the purity or quality of the water, to the detriment of other riparian owners, constitutes, in legal effect, a wrong and an invasion of private right, in like manner as a permanent obstruction or diversion of

the water. It tends directly to impair and destroy the use of the stream by others for reasonable and proper purposes. *Mason v. Hill*, 2 Nev. & M. 747, 5 Barn. & Adol. 1; *Wood v. Waud*, 13 Jur. 472, 3 Exch. 748; 3 Kent, Comm. (6th Ed.) 439; Ang. Water-Courses, § 136.

It is conceded in the present case that, by the mode in which the defendant conducts his business, a large quantity of poisonous and corrosive substances is permitted to run into the water of the stream on which the plaintiff's and defendant's manufactories are both situated, which defiles and corrupts the water to such an extent that the machinery of the plaintiff is corroded and destroyed, and the use of the water for reasonable and proper purposes is impaired and prevented. We know of no rule or principle of law by which such a mode of appropriation of a running stream, in the absence of any proof of a paramount right or title, can be justified or excused, as against a riparian owner of land on the same stream below. No fact appears in this case from which any right by grant, prescription, or adverse use is shown to exist, by virtue of which the defendant can claim to use the stream otherwise than as a riparian owner, entitled to the natural and ordinary rights and privileges which usually and legally attach and belong to the owner of land on the banks of a water-course. It is clear, therefore, that he has been guilty of an infraction of the plaintiff's rights.

The right of the latter to equitable relief is clear and unquestionable. The acts of the defendant tend to create a nuisance of a continuous and constantly accruing nature, for which an action of law can furnish no adequate relief. Ang. Water-Courses, §§ 444-446; *Bemis v. Upham*, 13 Pick. 169; *Hill v. Sayles*, 12 Cush. 454.

Perpetual injunction granted.

(See also *Prentice v. Geiger*, 74 N. Y. 341; *Young v. Bankier Distillery Co.* [1893] A. C. 691; *Lockwood Co. v. Lawrence*, 77 Me. 297, 52 Am. Rep. 763; *Dyeing Co. v. Wanskuck*, 13 R. I. 611; *Woodyear v. Schaefer*, 57 Md. 1, 40 Am. Rep. 419; *Carhart v. Gaslight Co.*, 22 Barb. 297; *Hayes v. Waldron*, 44 N. H. 580, 84 Am. Dec. 105; *Holsman v. Bleaching Co.*, 14 N. J. Eq. 335.)

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(L. R. 29 Ch. Div. 115.)

**BALLARD v. TOMLINSON (in part.)**

(Feb. 17, 1885.)

**UNDERGROUND WATER—POLLUTION OF WELL—NUISANCE—INJUNCTION.**

No one has a right to use his own land in such a way as to be a nuisance to his neighbour, and therefore if a man puts filth or poisonous matter on his land he must take care that it does not escape so as to poison water which his neighbor has a right to use, although his neighbor may have no property in such water at the time it is fouled.

The plaintiff and defendant were adjoining landowners, and had each a deep well on his own land, the plaintiff's land being at a lower level

than the defendant's. The defendant turned sewage from his house into his well, and thus polluted the water that percolated underground from the defendant's to the plaintiff's land, and consequently the water which came into the plaintiff's well from such percolating water when he used his well by pumping came adulterated with the sewage from the defendant's well.

*Held*, that the plaintiff had a right of action against the defendant for so polluting the source of supply, although until the plaintiff had appropriated it he had no property in the percolating water under his land, and although he appropriated such water by the artificial means of pumping.

Action for an injunction to restrain defendant from permitting his well to be so used as to pollute water in or coming to plaintiff's well, and for damages by reason of plaintiff's well and the source of supply thereto having been polluted by the drainage and sewage from defendant's premises. From a judgment for defendant, plaintiff appeals. Reversed.

BRETT, M. R. The defendant Tomlinson was possessed of a well upon his own property, which at one time he used merely as a well, but afterwards in a manner inconsistent with its being merely a well, as he allowed the sewage arising from the use of his buildings to go into the shaft of such well. Now it seems to me that the shaft of that well is an artificial thing, and that the defendants, therefore, collected a quantity of sewage into an artificial reservoir. The plaintiff, at a considerable distance from this well (the distance to my mind is wholly immaterial), has a well on his own property of considerable depth, which is lower than the bottom of this artificial shaft or well of the defendants. The collected sewage in the artificial shaft on the defendants' property has gone through the sides or bottom of this well into what is called the percolating water below the defendants' land. It is said on behalf of the defendants that, but for the mode in which the plaintiff uses his well by pumping, the sewage in the artificial shaft on the defendants' property would not have gone into the percolating water beneath his land, or, if it had, it would have remained on his land, or, at all events, it never would have gone into the plaintiff's well. In the result, when the plaintiff used his own well by means of the mechanical pump, it is clear that the water which then came into his well from the percolating water beneath his own land came there adulterated by the sewage which had been in the artificial shaft in the defendants' well.

Then arises the question whether the plaintiff, under the circumstances, can maintain an action against the defendants? Now, what are the rights of the parties? It seems to my mind to be clear from the decisions that no one has at any time any property in water percolating below the surface of the earth, even when it is under his own land; but it is equally clear that everybody has a right to appropriate that percolating water, at least whilst it is under his own land, to the extent that he may take it all so as to prevent any of it going on the land of his

neighbor. But his neighbor below him, according to the flow of water, has an equal right before the person above has appropriated it to take it all. He has a right to take the water from the percolating stream under his own land to this extent, that he may thereby cause the water which is under the land above him to come on his own land when it otherwise would not, and then to take that, and so on, until he has absolutely dried the land above him. This percolating water below the surface of the earth is therefore a common reservoir or source in which nobody has any property, but of which everybody has, as far as he can, the right of appropriating the whole.

Then arises the question, has any one of those who have an unlimited right of appropriation a right to contaminate that common reservoir or source, as against those who have an equal right with him to appropriate when he does not, or is he bound not to do anything which will prevent anybody to whom that unlimited right of appropriation shall come to have such water unaltered in quality? Now, it has been said by the Solicitor General in his clear argument that when the defendants pollute this common source under their own land they do not pollute any water in which the plaintiff has any property. That is quite true. The plaintiff has no property in that water whilst it is under the defendants' land, nor, indeed, whilst it is under his own land; and if all that could be said was that that common source was contaminated before the plaintiff had appropriated any part of it, the plaintiff could not, to my mind, maintain any action in respect of that contamination. Suppose a man had tapped this common source some distance off his own land for the purpose of experiment, and found it was contaminated before it would come under his own land. I think under those circumstances he could not maintain an action, because he had not appropriated the water, and therefore no injury was done to him at that time. But it does not seem to me to follow from that that he cannot maintain an action when water which he has appropriated has been contaminated by something which another person has done to that common source. In other words, it seems to me that although nobody has any property in the common source, yet everybody has a right to appropriate it, and to appropriate it in its natural state, and no one of those who have a right to appropriate it has a right to contaminate that source so as to prevent his neighbour from having the full value of his right of appropriation.

Then the next point taken by the Solicitor General was this: Assuming it to be true that there is such right to appropriate, yet if the person who has such right only appropriates by artificial means, and does so to such an extent that if he did not use those artificial means the water he would take would not be contaminated, then the polluted water must be said to be appropriated by him in that state by his own act, and therefore he cannot maintain the action. I cannot think that is a true proposition. The principle of natural user does not apply at all. The plain-

tiff, if he has a right to use anything in nature, has a right to exercise that user by all the skill and invention of which man is capable, and it seems to me that as long as the plaintiff uses only lawful means as against his neighbor, however ingenious or however artificial those means may be, his right to appropriate the common source is not diminished, because he uses the most artificial or the most ingenious methods. Therefore, however he may appropriate the water from the common source by the use of such artificial means, he has a right to have that common source uncontaminated by any act of any other person. Neither does it matter whether the parties are or not contiguous neighbors. If it can be shown in fact that the defendants have adulterated or fouled the common source, it signifies not how far the plaintiff's land is from their land. \*

The nearest case to the present I take to be the case of *Womersley v. Church*, 17 L. T. (N. S.) 190. I think that that case does show that the first proposition of the Solicitor General is wrong, but I do not think that it governs the second point taken by him. I think that the second point is partly noticed in the case of *Whaley v. Laing*, 2 H. & N. 476, 3 H. & N. 675; but it does not, in my opinion, want any authority. I disagree with the decision of Mr. Justice Pearson on this ground that, although nobody has any property in the percolating water, yet such water is a common source which everybody has a right to appropriate, and that, therefore, no one is justified in injuring the right of appropriation which everybody else has.

The other Judges concur.

(See *Upjohn v. Richland*, 46 Mich. 542, 9 N. W. 845, 41 Am. Rep. 178; *Good v. Altoona City*, 162 Pa. 493, 29 Atl. 741, 42 Am. St. Rep. 840; *Ball v. Nye*, 99 Mass. 582, 97 Am. Dec. 56; *Kinnaird v. Standard Oil Co.*, 89 Ky. 468, 12 S. W. 937, 7 L. R. A. 451, 25 Am. St. Rep. 545; *Beatrice Gas Co. v. Thomas*, 41 Neb. 662, 59 N. W. 925, 43 Am. St. Rep. 711; *Pottstown Gas Co. v. Murphy*, 39 Pa. 257.)

#### 4. Noise.

(146 Mass. 349, 15 N. E. 768, 4 Am. St. Rep. 316.)

#### ROGERS v. ELLIOTT.

(Supreme Judicial Court of Massachusetts. March 3, 1888.)

#### NUISANCES—CHURCH BELLS—ACTION FOR DAMAGES.

A person who, by reason of a sunstroke, is peculiarly susceptible to the noise caused by the ringing of a church bell, situated directly opposite his house in a thickly populated district, cannot, in the absence of evidence of express malice, or that the bell was objectionable to persons of ordinary health and strength, maintain an action against the custodian of such church for sufferings caused by the ringing of such bell.

Exceptions from Superior Court, Barnstable County; Staples, Judge. Action of tort by Jesse Rogers, Jr., against Thomas P. Elliott, pastor of St. Peter's Roman Catholic Church in Provincetown, to recover damages, the plaintiff alleging that in consequence of the continued ringing of the bell on said church, by the orders of the defendant, the plaintiff was put to great pain and suffering. It appeared at the trial that plaintiff was lying in bed at his father's house opposite the church, in a thickly settled district, suffering from a sunstroke, and that the ringing of the bell threw him into convulsions; that defendant refused the request of plaintiff's physician not to ring the bell, and insisted on ringing it, saying that he should not stop ringing the bell for anybody, even if he knew a person was sick, and the ringing would kill him. A verdict was directed for defendant, and plaintiff alleged exceptions.

KNOWLTON, J. The defendant was the custodian and authorized manager of property of the Roman Catholic Church used for religious worship. The acts for which the plaintiff seeks to hold him responsible were done in the use of this property, and the sole question before us is whether or not that use was unlawful. The plaintiff's case rests upon the proposition that the ringing of the bell was a nuisance. The consideration of this proposition involves an inquiry into what the defendant could properly do in the use of the real estate which he had in charge, and what was the standard by which his rights were to be measured. It appears that the church was built upon a public street, in a thickly-settled part of the town; and if the ringing of the bell on Sundays had materially affected the health or comfort of all in the vicinity, whether residing or passing there, this use of the property would have been a public nuisance, for which there would have been a remedy by indictment. Individuals suffering from it in their persons or their property could have recovered damages for a private nuisance. *Wesson v. Iron Co.*, 13 Allen, 95, 90 Am. Dec. 181. In an action of this kind, a fundamental question is, by what standard, as against the interests of a neighbor, is one's right to use his real estate to be measured? In densely populated communities, the use of property in many ways which are legitimate and proper necessarily affects in greater or less degree the property or persons of others in the vicinity. In such cases the inquiry always is, when rights are called in question, what is reasonable under the circumstances? If a use of property is objectionable solely on account of the noise which it makes, it is a nuisance, if at all, by reason of its effect upon the health or comfort of those who are within hearing. The right to make a noise for a proper purpose must be measured in reference to the degree of annoyance which others may reasonably be required to submit to. In connection with the importance of the business from which it proceeds, that must be determined by the effect of noise upon people generally, and not upon those, on the one hand, who are peculiarly susceptible to it, or those on the other, who,

by long experience, have learned to endure it without inconvenience; not upon those whose strong nerves and robust health enable them to endure the greatest disturbances without suffering, nor upon those whose mental or physical condition makes them painfully sensitive to everything about them. That this must be the rule in regard to public nuisances is obvious. It is the rule as well, and for reasons nearly, if not quite, as satisfactory, in relation to private nuisances. Upon a question whether one can lawfully ring his factory bell, or run his noisy machinery, or whether the noise will be a private nuisance to the occupant of a house near by, it is necessary to ascertain the natural and probable effect of the sound upon ordinary persons in that house—not how it will affect a particular person who happens to be there to-day, or who may chance to come to-morrow. *Fay v. Whitman*, 100 Mass. 76; *Davis v. Sawyer*, 133 Mass. 289, 43 Am. Rep. 519; *Walter v. Selfe*, 4 De Gex & S. 323; *Soltau v. De Held*, 2 Sim. (N. S.) 133; *Smelting Co. v. Tipping*, 11 H. L. Cas. 642. In *Walter v. Selfe*, Vice-Chancellor Knight Bruce, after elaborating his statement of the rule, concludes as follows: "They have, I think, established that the defendant's intended proceeding will, if prosecuted, abridge and diminish seriously and materially the ordinary comfort of existence to the occupier and inmates of the plaintiff's house, whatever their rank or station, whatever their age or state of health." It is said by Lord Romilly, master of the rolls, in *Crump v. Lambert*, L. R. 3 Eq. 408, that "the real question in all the cases is the question of fact, viz., whether the nuisance is such as materially to interfere with the ordinary comfort of human existence." In the opinion in *Sparhawk v. Railway Co.*, 54 Pa. 401, these words are used: "It seems to me that the rule expressed in the cases referred to is the only true one in judging of injuries from alleged nuisances, viz., such as naturally and necessarily result to all alike who come within their influence." In the case of *Westcott v. Middleton*, 43 N. J. Eq. 478, 11 Atl. 490, (decided December 9, 1887,) it appeared that the defendant carried on the business of an undertaker, and the windows of the plaintiff's house looked out upon his yard, where boxes which had been used to preserve the bodies of the dead were frequently washed, and where other objects were visible, and other work was going on, which affected the tender sensibilities of the plaintiff, and caused him great discomfort. Vice-Chancellor Bird, in dismissing the bill for an injunction against carrying on the business there, said: "The inquiry inevitably arises, if a decision is rendered in Mr. Westcott's favor because he is so morally or mentally constituted that the particular business complained of is an offense or a nuisance to him, or destructive to his comfort, or his enjoyment of his home, how many other cases will arise and claim the benefit of the same principle, however different the facts may be, or whatever may be the mental condition of the party complaining? \* \* \* A wide range has indeed been given to courts of equity, in dealing with these matters, but I can find no case where the

court has extended aid, unless the act complained of was, as I have above said, of a nature to affect all reasonable persons, similarly situated, alike." If one's right to use his property were to depend upon the effect of the use upon a person of peculiar temperament or disposition, or upon one suffering from an uncommon disease, the standard for measuring it would be so uncertain and fluctuating as to paralyze industrial enterprises. The owner of a factory containing noisy machinery, with dwelling-houses all about it, might find his business lawful as to all but one of the tenants of the houses, and as to that one, who dwelt no nearer than the others, it might be a nuisance. The character of his business might change from legal to illegal, or illegal to legal, with every change of tenants of an adjacent estate, or with an arrival or departure of a guest or boarder at a house near by; or even with the wakefulness or the tranquil repose of an invalid neighbor on a particular night. Legal rights to the use of property cannot be left to such uncertainty. When an act is of such a nature as to extend its influence to those in the vicinity, and its legal quality depends upon the effect of that influence, it is as important that the rightfulness of it should be tried by the experience of ordinary people, as it is, in determining a question as to negligence, that the test should be the common care of persons of ordinary prudence, without regard to the peculiarities of him whose conduct is on trial.

In the case at bar it is not contended that the ringing of the bell for church services in the manner shown by the evidence materially affected the health or comfort of ordinary people in the vicinity, but the plaintiff's claim rests upon the injury done him on account of his peculiar condition. However his request should have been treated by the defendant upon considerations of humanity, we think he could not put himself in a place of exposure to noise, and demand as of legal right that the bell should not be used. The plaintiff, in his brief, concedes that there was no evidence of express malice on the part of the defendant, but contends that malice was implied in his acts. In the absence of evidence that he acted wantonly, or with express malice, this implication could not come from his exercise of his legal rights. How far, and under what circumstances, malice may be material in cases of this kind, it is unnecessary to consider.

Judgment on the verdict.

(See also *Lord v. De Witt* [C. C.] 116 Fed. 713; *Davis v. Sawyer*, 133 Mass. 289; *Soltau v. De Held*, 2 Sim. [N. S.] 133; *McKeon v. See*, 51 N. Y. 300, 10 Am. Rep. 659; *Flish v. Dodge*, 4 Denio, 311, 47 Am. Dec. 254.)

## 5. Keeping dangerous substances.

(80 N. Y. 579, 36 Am. Rep. 654.)

HEEG v. LICHT.

(Court of Appeals of New York. April 6, 1880.)

### NUISANCE—KEEPING GUNPOWDER.

The mere keeping of gunpowder in dangerous proximity to the premises of another is a nuisance, rendering the person keeping it liable for injuries caused by its explosion, irrespective of the question of his negligence.

Appeal from Supreme Court, General Term, Second Department.

Action by Frank Heeg against Philip Licht to recover damages for injuries to plaintiff's buildings alleged to have been caused by the explosion of a powder magazine on defendant's premises, and for an injunction to restrain defendant from manufacturing and storing upon his premises fire-works and other explosive substances. A verdict was rendered for defendant, and the judgment entered thereon was affirmed on appeal to the general term. From the judgment of the general term plaintiff appealed.

MILLER, J. This action is sought to be maintained upon the ground that the manufacturing and storing of fire-works, and the use and keeping of materials of a dangerous and explosive character for that purpose, constituted a private nuisance, for which the defendant was liable to respond in damages, without regard to the question whether he was chargeable with carelessness or negligence. The defendant had constructed a powder magazine upon his premises, with the usual safeguards, in which he kept stored a quantity of powder, which, without any apparent cause, exploded, and caused the injury complained of. The judge upon the trial charged the jury that they must find for the defendant, unless they found that the defendant carelessly and negligently kept the gunpowder upon his premises. The judge refused to charge that the powder magazine was dangerous in itself to plaintiff and his property, and was a private nuisance, and the defendant was liable to the plaintiff, whether it was carelessly kept or not; and the plaintiff duly excepted to the charge and the refusal to charge.

We think that the charge made was erroneous, and not warranted by the facts presented upon the trial. The defendant had erected a building, and stored materials therein, which from their character were liable to and actually did explode, causing injury to the plaintiff. The fact that the explosion took place tends to establish that the magazine was dangerous, and liable to cause damage to the property of persons residing in the vicinity. The locality of works of this description must depend upon the neighborhood in which they are situated. In a city, with buildings immediately contiguous, and persons constantly passing,

there could be no question that such an erection would be unlawful and unauthorized. An explosion, under such circumstances, independent of any municipal regulations, would render the owner amenable for all damages arising therefrom. That the defendant's establishment was outside of the territorial limits of a city does not relieve the owner from responsibility or alter the case, if the dangerous erection was in close contiguity with dwelling-houses or buildings which might be injured or destroyed in case of an explosion. The fact that the magazine was liable to such contingency, which could not be guarded against or averted by the greatest degree of care and vigilance, evinces its dangerous character, and might in some localities render it a private nuisance. In such a case the rule which exonerates a party engaged in a lawful business, when free from negligence, has no application. The keeping or manufacturing of gunpowder or fire-works does not necessarily constitute a nuisance per se. That depends upon the locality, the quantity, and the surrounding circumstances, and not entirely upon the degree of care used. In the case at bar it should have been left for the jury to determine whether, from the dangerous character of the defendant's business, the proximity to other buildings, and all the facts proved upon the trial, the defendant was chargeable with maintaining a private nuisance and answerable for the damages arising from the explosion.

A private nuisance is defined to be anything done to the hurt or annoyance of the lands, tenements, or hereditaments of another. 3 Bl. Comm. 216. Any unwarrantable, unreasonable, or unlawful use by a person of his own property, real or personal, to the injury of another, comes within the definition stated, and renders the owner or possessor liable for damages arising from such use. Wood, Nuis. § 1, and authorities cited. The cases which are regarded as private nuisances are numerous, and the books are full of decisions holding the parties answerable for the injuries which result from their being maintained. The rule is of universal application that, while a man may prosecute such business as he chooses on his own premises, he has no right to erect and maintain a nuisance to the injury of an adjoining proprietor, or of his neighbors, even in the pursuit of a lawful trade. Aldred's Case, 9 Coke, 58; Brady v. Weeks, 3 Barb. 157; Dubois v. Budlong, 15 Abb. Prac. 445; Wier's Appeal, 74 Pa. 230.

While a class of the reported cases relates to the prosecution of a legitimate business, which of itself produces inconvenience and injury to others, another class refers to acts done on the premises of the owner, which are of themselves dangerous to the property and the persons of others who may reside in the vicinity, or who may by chance be passing along or in the neighborhood of the same. Of the former class are cases of slaughter-houses, fat and offal boiling establishments, hog-styes, or tallow manufactories, in or near a city, which are offensive to the senses, and render the enjoyment of life and property uncomfortable. Catlin v. Valentine, 9 Paige, 575, 38 Am. Dec. 567; Brady

*v. Weeks*, 3 Barb. 157; *Dubois v. Budlong*, 15 Abb. Prac. 445; *Rex v. White*, 1 Burrows, 337; 2 Bl. Comm. 215; *Farrand v. Marshall*, 21 Barb. 421. It is not necessary in these cases that the noxious trade or business should endanger the health of the neighborhood. So, also, the use of premises in a manner which causes a noise so continuous and excessive as to produce serious annoyance, or vapors or noxious smells, (*Tipping v. Smelting Co.*, 4 Best & S. 608; *Brill v. Flagler*, 23 Wend. 354; *Pickard v. Collins*, 23 Barb. 444; *Wood*, Nuis. § 5); or the burning of a brick-kiln from which gases escape which injure the trees of persons in the neighborhood, (*Campbell v. Seaman*, 63 N. Y. 568, 20 Am. Rep. 567). Of the latter class, also, are those where the owner blasts rocks with gunpowder, and the fragments are liable to be thrown on the premises, and injure the adjoining dwelling-houses, or the owner or persons there being, or where persons traveling may be injured by such use. *Hay v. Cohoes Co.*, 3 Barb. 42; *Id.*, 2 N. Y. 159, 51 Am. Dec. 279; *Tremain v. Cohoes Co.*, 2 N. Y. 163, 51 Am. Dec. 284; *Pixley v. Clark*, 35 N. Y. 523, 91 Am. Dec. 72. Most of the cases cited rest upon the maxim, *sic utere tuo*, etc.; and, where the right to the undisturbed possession and enjoyment of property comes in conflict with the rights of others, that it is better, as a matter of public policy, that a single individual should surrender the use of his land for especial purposes injurious to his neighbor or to others, than that the latter should be deprived of the use of their property altogether, or be subjected to great danger, loss, and injury, which might result if the rights of the former were without any restriction or restraint.

The keeping of gunpowder or other materials in a place, or under circumstances, where it would be liable, in case of explosion, to injure the dwelling-houses or the persons of those residing in close proximity, we think rests upon the same principle, and is governed by the same general rules. An individual has no more right to keep a magazine of powder upon his premises, which is dangerous, to the detriment of his neighbor, than he is authorized to engage in any other business which may occasion serious consequences.

The counsel for the defendant relies upon the case of *People v. Sands*, 1 Johns. 78, 3 Am. Dec. 296, to sustain the position that the defendant's business was neither a public nor a private nuisance. That was an indictment for keeping a quantity of gunpowder near dwelling-houses, and near a public street; and it was held (*Spencer, J.*, dissenting) that the fact as charged did not amount to a nuisance, and that it should have been alleged to have been negligently and improvidently kept. It will be seen that the case was disposed of upon the form of the indictment, and, while it may well be that an allegation of negligence is necessary where an indictment is for a public nuisance, it by no means follows that negligence is essential in a private action to recover damages for an alleged nuisance. In *Myers v. Malcolm*, 6 Hill, 292, 41 Am. Dec. 744, it was held that the

act of keeping a large quantity of gunpowder, insufficiently secured, near other buildings, thereby endangering the lives of persons residing in the vicinity, amounted to a public nuisance, and an action would lie for damages where an explosion occurred causing injury. Nelson, C. J., citing *People v. Sands*, supra, says: "Upon the principle that nothing will be intended or inferred to support an indictment, the court said, for aught they could see, the house may have been one built and secured for the purpose of keeping powder in such a way as not to expose the neighborhood;" and he cites several authorities which uphold the doctrine that, where gunpowder is kept in such a place as is dangerous to the inhabitants or passengers, it will be regarded as a nuisance. The case of *People v. Sands* is not, therefore, controlling upon the question of negligence. *Fillo v. Jones*, 2 Abb. Dec. 121, is also relied upon, but does not sustain the doctrine contended for; and it is there held that an action for damages caused by the explosion of fire-works may be maintained upon the theory that the defendant was guilty of a wrongful and unlawful act, or of default, in keeping them at the place they were kept, because they were liable to spontaneous combustion and explosion, and thus endangered the lives of persons in their vicinity, and that the injury was occasioned by such spontaneous combustion and explosion.

It is apparent that negligence alone in the keeping of gunpowder is not controlling, and that the danger arising from the locality where the fire-works or gunpowder are kept is to be taken into consideration in maintaining an action of this character. We think that the request to charge was too broad, and properly refused. The charge, however, should have been in conformity with the rule herein laid down, and, for the error of the judge in the charge, the judgment should be reversed, and a new trial granted, with costs to abide the event. All concur.

Judgment reversed.

(See, to the same effect, *Kleebauer v. Western Fuse & Explosives Co.* [Cal.] 69 Pac. 246, 60 L. R. A. 377 [powder magazine]; *Hazard Powder Co. v. Volger*, 58 Fed. 153, 7 C. C. A. 136 [Id.]; *Bradford Glycerine Co. v. St. Mary's Mfg. Co.*, 60 Ohio St. 560, 54 N. E. 528, 45 L. R. A. 658, 71 Am. St. Rep. 740 [nitroglycerine]; *Wier's Appeal*, 74 Pa. 230; *McAndrews v. Collierd*, 42 N. J. Law, 189, 36 Am. Rep. 508; *Lafin Powder Co. v. Tearney*, 131 Ill. 325, 23 N. E. 389, 7 L. R. A. 262, 19 Am. St. Rep. 34; *Prussak v. Hutton*, 30 App. Div. 66, 51 N. Y. Supp. 761; *Comm. v. Kidder*, 107 Mass. 188.)

## 6. Obstruction of highway.

(18 N. Y. 79.)

CONGREVE v. SMITH et al.

(Court of Appeals of New York. September, 1858.)

### 1. HIGHWAYS—EXCAVATION UNDER SIDEWALK.

Persons who, without authority, make or continue a covered excavation in a public street or highway for a private purpose are liable for all injuries to individuals resulting from the street or highway being thereby less safe for its appropriate use (there being no negligence by the parties injured), without regard to the question of negligence in those who make the excavation.

### 2. SAME—INDEPENDENT CONTRACTORS—CONTINUING NUISANCE.

That the injuries were caused by the negligence, in covering the excavation, of servants of contractors for that work, who had contracted to do it properly, does not relieve from liability the persons who procured it to be done, and did not object to it, and continued the excavation in its unsafe condition, they being bound, at their peril, to make and at all times keep the street as safe as it would have been if the excavation had not been made.

Appeal from Superior Court of New York City, General Term.

Action by Congreve against Smith and another for personal injuries caused by the breaking of a flag-stone, over an area in the street in front of defendants' premises, while plaintiff was traveling thereon. The area was built under the sidewalk outside the lot-line in the street proper, and the flag-walk was laid over the same by persons who erected the adjoining building and the area under contract with defendant owners. Defendants sought to escape liability on the ground that the persons who built the area and walk were independent contractors, skillful mechanics, and were required by their contract to build the same in a skillful manner, using the best of materials; but the court charged that defendants were liable in the same manner as their contractors would have been, and the question was whether the stone was such as a prudent and skillful mechanic would have used, to which defendants excepted. The jury rendered a verdict for plaintiff for \$650. The judgment entered thereon was affirmed by the general term. From the judgment of the general term defendants appealed.

STRONG, J. The verdict of the jury, under the instructions given them by the court, involves the finding that the stone covering the area was unsuitable and unsafe for that purpose, wherefore it broke, and the plaintiff received the injury in question. The area was under the surface of the public street, and was maintained for the benefit of the property of the defendants, and the stone was placed over it

under contractors with the defendants for the completion of the defendants' building, in pursuance of the contract. No license from the city for the area was proved.

It certainly is just that persons who, without special authority, make or continue a covered excavation in a public street or highway, for a private purpose, should be responsible for all injuries to individuals resulting from the street or highway being thereby less safe for its appropriate use, there being no negligence by the parties injured; and I entertain no doubt that a liability to that extent is imposed on them by law. Such is clearly the legal responsibility for placing objects upon the surface of the ground, obstructing the full and free enjoyment of the easement; and there does not appear to be any distinction in principle as to the liability of a party for an act making the use of the easement dangerous, arising from the mode in which it is done, whether by objects upon or over the surface, which may be run upon or against, or by holes in the earth into which persons may fall. The general doctrine is that the public are entitled to the street or highway in the condition in which they placed it; and whoever, without special authority, materially obstructs it, or renders its use hazardous, by doing anything upon, above, or below the surface, is guilty of a nuisance; and, as in all other cases of public nuisance, individuals sustaining special damage from it, without any want of due care to avoid injury, have a remedy by action against the author or person continuing the nuisance. No question of negligence can arise, the act being wrongful. It is as much a wrong to impair the safety of a street by undermining it as by placing objects upon it. There can be no difference in regard to the nature of the act or the rule of liability, whether the fee of the land within the limits of the easement is in a municipal corporation or in him by whom the act complained of was done; in either case, the act of injuring the easement is illegal.

The case of *Dygert v. Schenck*, 23 Wend. 446, 35 Am. Dec. 575, appears to be directly in point. In that case it was held that the defendant, who had dug a race-way across a public road, over his own land, to conduct water to his mill, and built a bridge across it, was liable for an injury sustained in consequence of the bridge being out of repair. The court, by Cowen, J., said that, in suffering the bridge to become unsafe, "the defendant came short of his obligation to the public. Any act of an individual done to the highway, if it detract from the safety of travelers, is a nuisance." And again: "Special damage arising from it, therefore, furnishes ground for private action, without regard to the question of negligence in him who digs it. The utmost care to prevent mischief will not protect him, if the injury happen without gross carelessness on the part of the sufferer."

It is no answer to the present action that the covering of the area was done under the contractors, who had contracted to do the work

properly, and that the defendants are not responsible for the negligence of the contractors' servants. The act was that of the defendants. They procured it to be done, and do not appear to have objected to it. Besides, the action may well stand on the basis of continuing the area and the stone covering it, they making the easement unsafe, compared with what it otherwise would have been. That is a sufficient ground of liability. The defendants were bound, at their peril, to make, and at all times keep, the street as safe as it would have been if the area had not been constructed. The defendants, therefore, have no ground for complaint with any of the rulings at the trial, or of the charge to the jury, and the judgment should be affirmed.

SELDEN, J., was absent. All the other judges concurred.

Judgment affirmed.

(See also *Callanan v. Gilman*, 107 N. Y. 360, 14 N. E. 264, 1 Am. St. Rep. 831; *Cohen v. Mayor*, etc., 113 N. Y. 532, 21 N. E. 700, 4 L. R. A. 406, 10 Am. St. Rep. 506; *Marine Ins. Co. v. St. Louis, I. M. & S. R. Co.* [C. C.] 41 Fed. 643; *Calder v. Smalley*, 66 Iowa, 219, 23 N. W. 638, 55 Am. Rep. 270. A coal hole constructed in a sidewalk without lawful permit has been held a nuisance, and if a passer-by is injured without fault on his own part, by falling into it, the owner of the premises [or his tenant in proper cases] has been held liable, though not chargeable with negligence. But if lawful authority be obtained to make the coal hole, it is not a nuisance, and the owner is not liable unless proved guilty of negligence. *Clifford v. Dam*, 81 N. Y. 52; *Wolf v. Kilpatrick*, 101 N. Y. 146, 4 N. E. 188, 54 Am. Rep. 672; 2 *Dillon, Mun. Corp.* [4th Ed.] §§ 1032-1035.)

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### III. WHO RESPONSIBLE.

(108 Pa. 489.)

**HOW v. ROBERTS.**

(Supreme Court of Pennsylvania. March 9, 1885.)

**NUISANCE—WHO LIABLE—LANDLORD AND TENANT.**

Where a cess-pool is so constructed by the owner of the premises that the offensive matter deposited therein by his tenants necessarily percolates through to the adjoining premises, the owner is equally liable with the tenants for the injury to the adjoining occupant.

Error to the court of common pleas No. 2 of Philadelphia county, of July term, 1884, No. 17.

Action on the case by George Fow against Elizabeth Roberts. On the trial it appeared that a cess-pool on defendant's premises was constructed within a foot of the cellar wall on the adjoining premises

owned and occupied by plaintiff; that defendant's premises were three houses, rented to tenants, all of whom had the use of such cess-pool; that when the offensive matter deposited therein by the tenants rose to the height of the plaintiff's cellar floor it percolated through, and rendered his premises uninhabitable. The trial court held that the tenants alone were liable, and nonsuited plaintiff; whereupon plaintiff sued out this writ of error, assigning as error the entry of the nonsuit, and a subsequent refusal to take it off.

Argued before MERCUR, C. J., PAXSON, TRUNKEY, STERRETT, GREEN, and CLARK, JJ.; GORDON, J., absent.

PAXSON, J. It needs but a cursory examination of the evidence in this case to see that the privy-well complained of was a nuisance of the most offensive character. It was situated but one foot from the line which divided the property of the plaintiff from that of the defendant, and when filled to a certain point the filthy matter percolated through the wall into the plaintiff's cellar. Indeed, there appears to have been little dispute at the trial below either as to the existence of the nuisance or its character. The main question was, who was liable therefor, the tenant in possession, or the landlord who had demised the premises with the privy located as above described? The suit was against the landlord for maintaining the nuisance. The court below nonsuited the plaintiff, upon the ground that the tenant was alone liable.

The defendant contended that the well was not *per se* a nuisance; that when she leased the property to the present tenant, in 1879, no complaint had been made of the well, and that it had become a nuisance by the manner of its use by the tenants; that they had allowed it to be used by two or three families, and had neglected to have it cleaned at the proper time.

The law upon this subject was correctly stated in the recent case of *Knauss v. Brua*, decided at the last term in the middle district, (107 Pa. 85,) where it was said by our Brother Gordon: "We do not doubt but that, in the absence of an agreement to repair, the landlord is not liable to a third party for a nuisance resulting from dilapidation in the leasehold premises while in the possession of a tenant. To make the lessor so liable, the effect must be one that arises necessarily from a continuance of the use of the property as it was when the tenant took possession of it. But the converse of this proposition is also true; if the premises are so constructed, or in such a condition, that the continuance of their use by the tenant must result in a nuisance to a third person, and a nuisance does so result, the landlord is liable."

Applying this principle to the case in hand, it is too clear for argument that the tenant would be responsible to the plaintiff for the flow of the offensive matter upon the premises of the latter. He is re-

sponsible for the reason that the act complained of is his. The filth was deposited there by himself, his family, or by others whom he permitted to use the privy.

Is the landlord also liable? We are not considering any question for liability of repairs, as between landlord and tenant. It does not arise necessarily in the case. But if the landlord constructed or maintained his privy in such position, as regards his neighbor's property, that its use would result in a nuisance to the latter, and demised it to a tenant, we are of opinion that he is responsible for the consequences of its use. The privy, as before stated, was within one foot of the plaintiff's cellar wall. A property owner who so locates a privy on his premises ought to know that it may, and probably will, become a nuisance. To build a cess-pool now within two feet of the line of any adjoining lot would be a violation of a city ordinance, and it is a violation of said ordinance to maintain a cess-pool within said limits. The reason for this wise municipal regulation undoubtedly is that cess-pools so constructed are nuisances, and endanger, not only the comfort, but the health, of citizens.

The defendant having demised the premises in question to a tenant with a cess-pool so situated thereon that its use must necessarily result in a nuisance to the plaintiff, we are of opinion that she is liable to the plaintiff. It was urged, however, that it was only for the manner of its use that the well became a nuisance. We fail to see the force of this reasoning. The cess-pool was used for the very purpose for which it was constructed, and the tenant had the right to use it. We cannot measure the extent to which a cess-pool may be lawfully used. Its lawful use in this case resulted in a nuisance to the plaintiff. The defendant demised the premises, with the cess-pool so located that it would naturally produce such a result, and for the result we must hold her to be liable.

The judgment is reversed, and a procedendo is awarded.

("It is not the general rule that an owner of land is, as such, responsible for any nuisance thereon. It is the occupier, and he alone, to whom such responsibility generally and prima facie attaches. The owner is responsible if he creates a nuisance and maintains it; if he creates a nuisance and then demises the land with the nuisance thereon, although he is out of occupation; if the nuisance was erected on the land by a prior owner, or by a stranger, and he knowingly maintains it; if he has demised premises and covenanted to keep them in repair, and omits to repair, and thus they become a nuisance; if he demises premises to be used as a nuisance, or for a business, or in a way so that they will necessarily become a nuisance. But an owner who has demised premises for a term during which they become ruinous, and thus a nuisance, is not responsible for the nuisance, unless he has covenanted to repair." *Ahern v. Steele*, 115 N. Y., at page 209, 22 N. E. 194, 5 L. R. A. 449, 12 Am. St. Rep. 778.)

(19 N. H. 471.)

**CURTICE v. THOMPSON et al.**

(Superior Court of Judicature of New Hampshire. July Term, 1849.)

**1. NUISANCE—ALTERATION OF DAM—FLOWAGE.**

Evidence that a party, by making a dam higher or tighter than it had been, caused the water to flow the plaintiff's land to a greater height than before, is admissible in an action on the case, for maintaining and keeping up a dam.

**2. SAME—CONVEYANCE OF LAND.**

The party erecting or otherwise causing such a nuisance is not exonerated, by conveying the land to another, from damages arising therefrom after the conveyance.

**3. SAME—NOTICE TO ABATE—ACTION.**

The party who, by means of such alterations in the dam, causes the wrongful flowing, is not entitled to notice to abate, before action brought.

Defendants purchased a mill dam which had been acquired by long use and acquiescence, and thereafter raised the same and made it tighter than before, thereby causing plaintiff's land to be flowed beyond the right of defendants. After the alteration in the dam defendants conveyed the same to another. The injuries from the overflowage occurred after such conveyance. Judgment on verdict for plaintiff.

**WOODS, J.** A question is made in this case whether the facts proved sustain the plaintiff's allegation that the defendants maintained, kept up, and continued the dam, and thereby caused the plaintiff's land to be overflowed. The defendants purchased the mill and the dam in 1842, and had the right to maintain and keep it as they then found it. But in 1843 they repaired the dam, and so changed its character and construction as to cause the damage of which the plaintiff complains. His land was flowed beyond the point to which the defendants had any right to flow it by means of their dam. This is the substance of what is charged in the declaration, and fully sustains it. To this point was the case of *Bunker v. Bunker*, decided in Belknap, July term, 1847.

The defendants, however, say that having, as early as 1844, parted with their possession of the dam, and with all control of its waters, and conveyed, with certain reservations, their whole interest therein to other parties, who, from a day somewhat anterior to the conveyance, and until the commencement of the suit, exercised an undivided management and use of the premises, they are not responsible for the damage that ensued during the period named in the writ. But this question was examined in *Plumer v. Harper*, 3 N. H. 92, 14 Am. Dec. 333, where it was held that the party who erects the nuisance

continues liable so long as it exists, although a like liability may have attached to other parties by becoming purchasers.

Without, therefore, laying any stress upon the reservations in the conveyances of these defendants to Leeds, as having the effect of making them partakers with him in the benefits of the nuisance, and partial procurers of the maintenance of it, we are bound, by the very reasonable and well-established doctrine of that case, to adjudge them liable in this action, as the original authors of the wrong.

The defendants further insist that, having purchased the land with the dam upon it, they are entitled to notice from the plaintiff of the injurious nature of the structure, and to a request from the complaining party for its removal, before they can be charged in an action for maintaining it. In this they would be deemed to be perfectly correct, if the thing complained of were the same which they found upon the land at the time of their purchase. But such is not the fact. The gravamen is that they maintained a dam whereby the plaintiff's land was flooded. Such was not the dam which their grantors erected or maintained, but the dam in its altered character, whether higher or tighter than the rightful structure which they purchased. As the authors of the nuisance, then, they have no right to any notice. They are liable upon the evidence, which charges them with having caused the nuisance, notice being required only to charge a purchaser by reason of having adopted it.

Judgment on the verdict.

("The doctrine of the cases in this state and elsewhere is that he who erects a nuisance does not, by conveying the land to another, transfer the liability for the erection to the grantee; and the grantee is not liable until, upon request, he refuses to remove the nuisance, for the reason that he cannot know until such request but that the dam" [this was the nuisance in this case] "was rightfully erected; and there can be no injury in holding to this doctrine, as the original wrong-doer continues liable, notwithstanding his alienation." *Eastman v. Amoskeag Mfg. Co.*, 44 N. H., at page 156, 82 Am. Dec. 201; *Sloggy v. Dilworth*, 38 Minn. 179, 36 N. W. 451, 8 Am. St. Rep. 656; *Hyde Park Light Co. v. Porter*, 167 Ill. 276, 47 N. E. 206. "The ground upon which the alienor is held liable for a nuisance created by him is that he is the author of the original wrong, and transferring the premises with the original wrong still existing is treated as affirming the continuance of it." *East Jersey Water Co. v. Bigelow*, 60 N. J. Law, at page 204, 38 Atl. 632. See also *Johnson v. Lewis*, 13 Conn. 303, 33 Am. Dec. 405; 21 Am. and Eng. Encyc. of Law (2d Ed.) 719, 720.

In New York the rule as to the liability of the grantor is more qualified: "A party who has erected a nuisance will sometimes be answerable for its continuance after he has parted with the possession of the land; but it is only when he continues to derive a benefit from the nuisance, as by demising the premises and receiving rent, or where he conveys the property with covenants for the continuance of the nuisance." *Mayor of Albany v. Cunliff*, 2 N. Y., at page 174; *Covert v. Cranford*, 141 N. Y. 521, 527, 36 N. E. 297, 38 Am. St. Rep. 826; *Hanse v. Cowing*, 1 Lans. 288.)

(3 Allen, 264, 80 Am. Dec. 72.)

McDONOUGH v. GILMAN.

(Supreme Judicial Court of Massachusetts. Nov. Term, 1861.)

**1. NUISANCE—WHO LIABLE—LANDLORD AND TENANT.**

A tenant for years, who restores a nuisance to a right of way after the same has been abated, is liable therefor, although the same existed before his tenancy; but merely repairing it after it was injured, but not abated, will not make him liable, if it does not become more of a nuisance thereby.

**2. SAME—CONTINUING NUISANCE—NOTICE TO REMOVE.**

A tenant for years is not liable for keeping a nuisance as it was used before his tenancy commenced, in the absence of a request to remove it, if he does no new act of itself amounting to a nuisance.

**3. SAME.**

The notice to a tenant to remove a nuisance which is kept by him in the manner in which it existed when his tenancy commenced, without any act on his part amounting in itself to a nuisance, must be clear and unequivocal, to make him liable for the continuance.

Exceptions from Superior Court, Suffolk County.

Action of tort by Patrick McDonough against George W. Gilman for erecting and maintaining a nuisance on plaintiff's right of way. Verdict was rendered for plaintiff. Defendant alleged exceptions.

CHAPMAN, J. The plaintiff's declaration in this case is very loose and inartificial; but the amended count on which he relies states, in substance, that he has a right of way, as therein described, and that the defendant has obstructed it by erecting and maintaining on a part of it a staircase, privy, and vault. On the trial it appeared that these structures were placed there, not by the tenant, who is a lessee for years, but by his lessors; and that his lease contains the following clause: "The passage-ways around the said buildings [the leased premises] are reserved by the lessors, who hereby lease only the right of such use thereof as may be necessary for the enjoyment of the building aforesaid." One of these passage-ways is the way in question; and the fee of the land is in the lessors, subject to the plaintiff's right of way. The privy and vault existed before the defendant became tenant, about 18 years ago. It does not appear when the staircase was built.

The instruction to the jury that, if they found the privy was a nuisance, and the plaintiff abated it, and the defendant restored it, he is liable, was correct; for in such case the existing nuisance would have been erected by him, and not by his lessor. But the instruction does not appear to be applicable to the facts as reported. It is stated that "on one occasion the plaintiff commenced beating down said staircase with his axe, when the defendant restrained him therefrom;

and on one occasion the plaintiff beat off the boards from said privy, and the defendant refitted it." It is not stated that the plaintiff removed the frame of the privy. He merely knocked off the boards, which would make it none the less a nuisance, and the defendant merely refitted it, which did not make it any more a nuisance than before. The act would be merely keeping and maintaining it, not erecting it. It would be like the case of *Beswick v. Cunden*, Cro. Eliz. 520. In that case the declaration alleged that the defendant kept and maintained a bank by which a brook was caused to flow around the plaintiff's land. The court said: "There is not here any offense committed by the defendant; for he allegeth that he kept and maintained a bank, which is that he kept it as he found it; and it is not any offense done by him, for he did not do anything; and, if it were a nuisance before his time, it is not any offense in him to keep it." And the case is distinguished from other cases where every using is a new nuisance, as the using of an aqueduct which takes water wrongfully from another. There every turning of the cock to let the water flow is a new nuisance. The act of refitting the privy must have been an act which rendered it more a nuisance to the passage-way than it would otherwise have been, to make the defendant liable as an erector of the nuisance. The act of the defendant in restraining the plaintiff from beating down the staircase with an axe is not embraced in this ruling, and the character and circumstances of the act do not fully appear.

The other instructions excepted to were as follows: "That, if the privy and staircase were an obstruction of the plaintiff's right of way, then the tenant is liable to an action, if the obstruction continued, and if he occupied the premises after notice was given to him by the plaintiff to remove the obstructions, although they were erected by his landlord; and that the law does not prescribe the kind of notice which should thus be given by the plaintiff to the defendant to remove said obstructions;" and he submitted the question to the jury whether such notice had or had not been given. The report states all the evidence of notice that was offered, and it is as follows: "The plaintiff complained to the defendant of the erection of the staircase at the time when it was erected; and on another occasion the plaintiff asked the defendant how he thought he could drive a team with two tons of coal by said stairway to his house." His attempting to beat down the staircase with an axe, and knocking the boards off from the privy, are not a notice. The court are of opinion that this instruction was not quite correct.

In *Penruddock's Case*, 5 Coke, 100b, it was resolved that an action lies against one who erects a nuisance, without any request made to abate it, but not against the feoffee, unless he does not reform the nuisance after request made. In *Winsmore v. Greenbank*, Willes, 583, *Penruddock's Case* is referred to, with the remark that the law

is certainly so. In 2 Chit. Pl. (6th Amer. Ed.) 770, note, pleaders are advised to allege in the declaration a special request to remove the nuisance in actions against the grantee of the premises. In *Pierson v. Glean*, 14 N. J. Law, 37, 25 Am. Dec. 497, Hornblower, C. J., says: "The law, as settled in *Penruddock's Case*, has never, I believe, been seriously questioned since." This action was for maintaining a dam erected by a former owner, and it was held that it could not be maintained without a request to reform the nuisance. In *Woodman v. Tufts*, 9 N. H. 92, the same doctrine is held, and the court proceed to say: "And the question arises, what that request must be. It undoubtedly must be so distinctly and definitely stated as to convey clearly the ground of the complaint, with a notice that the plaintiff will not longer submit to the continuance of the cause of the injury." "No particular form of words is required." This does not quite come up to the law of *Penruddock's Case*. We think that there should be, in some unequivocal language, a request to the tenant to reform or remove a nuisance, before he can be held liable for its continuance. It is not unreasonable to hold the plaintiff who proceeds against the lessee to this strictness. The landlord or grantor himself is liable, notwithstanding his lease or grant, for the continuance of the nuisance. This was settled in *Roswell v. Prior*, 12 Mod. 635. In that case the plaintiff had recovered against the defendant for erecting a building which stopped the plaintiff's ancient lights. The defendant had granted over the ground with the nuisance to another, and contended that he was no longer liable, but that the action should be against the lessee. But the court said: "Surely this action is well brought against the erector, for before his assignment over he was liable for all consequential damages, and it shall not be in his power to discharge himself by granting it over, and more especially here, where he grants over, reserving rent, whereby he agrees with the grantee that the nuisance should continue, and has a recompense, viz., the rent for the same; for surely when one erects a nuisance, and grants it over in that manner, he is a continuer with a witness." But the tenant, who merely enters upon the premises and occupies them under an obligation to pay rent for the whole and to commit no waste, cannot reasonably be regarded as a wrong-doer till the party injured distinctly and unequivocally complains to him of the injury, and informs him that he is expected to act in the matter, and remove it. In *Ryppon v. Bowles*, Cro. Jac. 373, it is said that Coke, C. J., inclined to the opinion that a tenant for years is not liable for the mere occupation of a building erected by his lessor, and which obstructs the plaintiff's lights, because his tearing down the building would be waste as to his landlord.

In the present case the language proved does not amount to a request, and the jury should have been so instructed; for, though verbal communications are to be construed by the jury under instruc-

tions from the court, yet when a communication cannot, by any fair interpretation, be regarded as a sufficient notice or request, the jury should be so instructed as to its meaning.

Exceptions sustained.

(This same rule as to the need of a request to abate applies to grantees or devisees as well as to lessees. *Ahern v. Steele*, 115 N. Y., at page 210, 22 N. E. 194, 5 L. R. A. 449, 12 Am. St. Rep. 778; *Nichols v. City of Boston*, 98 Mass. 39, 93 Am. Dec. 132. See also *Sandford v. Clarke*, 21 Q. B. Div. 398; *Dalay v. Savage*, 145 Mass. 38, 12 N. E. 841, 1 Am. St. Rep. 429; *Lufkin v. Zane*, 157 Mass. 117, 31 N. E. 757, 77 L. R. A. 251, 34 Am. St. Rep. 262; *Joyce v. Martin*, 15 R. I. 558, 10 Atl. 620; *Pope v. Boyle*, 98 Mo. 527, 11 S. W. 1010; *Clifford v. Cotton Mills*, 146 Mass. 47, 15 N. E. 84, 4 Am. St. Rep. 279; *Lee v. McLaughlin*, 86 Me. 410, 30 Atl. 65, 26 L. R. A. 197; *Nugent v. Boston, C & M. R. Co.*, 80 Me. 62, 12 Atl. 797, 6 Am. St. Rep. 151; *Ingwersen v. Rankin*, 47 N. J. Law, 18, 54 Am. Rep. 109; *Lane v. Cox* [1897] 1 Q. B. 415. The law of New York differs somewhat from that of the principal case. Thus it is held that where a person acquires title to land upon which there is a nuisance, the mere omission to abate or remove it does not render him liable; it is necessary to prove either a request to him to abate it, or that he had notice or knowledge of its existence. *Conhocton Stone Road v. Buffalo, N. Y. & E. R. Co.*, 51 N. Y. 573, 10 Am. Rep. 646; *Wenzlick v. McCotter*, 87 N. Y. 122, 41 Am. Rep. 358; *Timlin v. Standard Oil Co.*, 126 N. Y. 514, 27 N. E. 786, 22 Am. St. Rep. 845.)

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## IV. PRIVATE INJURY FROM PUBLIC NUISANCE.

(13 Allen, 95, 90 Am. Dec. 181.)

WESSON v. WASHBURN IRON CO.

(Supreme Judicial Court of Massachusetts. Oct. Term, 1866.)

### 1. PUBLIC NUISANCE—SPECIAL DAMAGE TO INDIVIDUALS.

Where the right invaded or impaired is a common and public one, which every subject of the state may exercise and enjoy, a mere deprivation or obstruction of the use which hinders all persons alike, and does not cause any special or peculiar damage to any one, furnishes no valid cause of action to an individual, although he may suffer inconvenience greater in degree than others from the alleged obstruction or hindrance. But when the alleged nuisance injures private property, or the health or comfort of an individual, it is in its nature special and peculiar, and cannot be said to cause a common or public damage; and it is actionable, though it is committed in a manner and under circumstances which would render the guilty party liable to an indictment for a common nuisance.

### 2. SAME—NOISE, SMOKE, AND NOXIOUS VAPORS.

A person may recover for injuries to his premises caused by noise, smoke, and noxious vapors in the operation of another's rolling-mills, though many other persons in the same neighborhood are injured in the same way.

Exceptions from Superior Court, Worcester County.

Action by Betsey Wesson against the Washburn Iron Company for injuries to plaintiff's premises caused by the operation of defendant's rolling-mill and foundry. It appeared at the trial that defendant's works were erected in a proper locality, and were properly constructed and managed, but that the jarring and noise from the machinery, and the smoke, cinders, dust, and gas from its operation, were so great as materially to injure plaintiff's premises. Plaintiff requested the court to instruct the jury that if her dwelling-house was injured by jarring and shaking, and rendered unfit for habitation by smoke, cinders, dust, and gas from defendant's works, it was no defense to the action that many other houses in the neighborhood were affected in a similar manner. But the judge declined so to rule, and instructed the jury, in accordance with defendant's request, that plaintiff could not maintain the action if it appeared that the damage which plaintiff had sustained in her estate was common to all others in the vicinity; but it must appear that she had sustained some special damage, differing in kind and degree from that common to all others in the neighborhood. The jury found a verdict for defendant. Plaintiff alleged exceptions.

BIGELOW, C. J. The interesting question is to be considered whether the instructions under which the case was submitted to the jury were correct, and appropriate to the facts in proof. There can be no doubt of the truth of the general principle stated by the court, that a nuisance may exist which occasions an injury to an individual, for which an action cannot be maintained in his favor, unless he can show some special damage in his person or property, differing in kind and degree from that which is sustained by other persons who are subjected to inconvenience and injury from the same cause. The difficulty lies in the application of this principle. The true limit, as we understand it, within which its operation is allowed, is to be found in the nature of the nuisance which is the subject of complaint. If the right invaded or impaired is a common and public one, which every subject of the state may exercise and enjoy, such as the use of a highway, or canal, or public landing place, or a common watering place on a stream or pond of water, in all such cases a mere deprivation or obstruction of the use which excludes or hinders all persons alike from the enjoyment of the common right, and which does not cause any special or peculiar damage to any one, furnishes no valid cause of action in favor of an individual, although he may suffer inconvenience or delay greater in degree than others from the alleged obstruction or hindrance. The private injury, in this class of cases, is said to be merged in the common nuisance and injury to all citizens, and the right is to be vindicated and the wrong punished by a public prosecution, and not by a multiplicity of separate actions

in favor of private individuals. Several instances of the application of this rule are to be found in our own Reports. *Stetson v. Faxon*, 19 Pick. 147, 31 Am. Dec. 123; *Thayer v. Boston*, 19 Pick. 511, 514, 31 Am. Dec. 157; *Quincy Canal v. Newcomb*, 7 Metc. (Mass.) 276, 283, 39 Am. Dec. 778; *Holman v. Townsend*, 13 Metc. (Mass.) 297, 299; *Smith v. Boston*, 7 Cush. 254; *Brainard v. Railroad Co.*, Id. 506, 511; *Blood v. Railroad Corp.*, 2 Gray, 140, 61 Am. Dec. 444; *Brightman v. Fairhaven*, 7 Gray, 271; *Harvard College v. Stearns*, 15 Gray, 1; *Willard v. Cambridge*, 3 Allen, 574; *Hartshorn v. South Reading*, Id. 501; *Fall River Iron-Works Co. v. Old Colony & F. R. R. Co.*, 5 Allen, 224.

But it will be found that in all these cases, and in others in which the same principle has been laid down, it has been applied to that class of nuisances which have caused a hindrance or obstruction in the exercise of a right which is common to every person in the community, and that it has never been extended to cases where the alleged wrong is done to private property, or the health of individuals is injured, or their peace and comfort in their dwellings is impaired by the carrying on of offensive trades and occupations which create noisome smells or disturbing noises, or cause other annoyances and injuries to persons and property in the vicinity, however numerous or extensive may be the instances of discomfort, inconvenience, and injury to persons and property thereby occasioned. Where a public right or privilege, common to every person in the community, is interrupted or interfered with, a nuisance is created by the very act of interruption or interference, which subjects the party through whose agency it is done to a public prosecution, although no actual injury or damage may be thereby caused to any one. If, for example, a public way is obstructed, the existence of the obstruction is a nuisance, and punishable as such, even if no inconvenience or delay to public travel actually takes place. It would not be necessary, in a prosecution for such a nuisance, to show that any one had been delayed or turned aside. The offense would be complete, although during the continuance of the obstruction no one had had occasion to pass over the way. The wrong consists in doing an act inconsistent with and in derogation of the public or common right. It is in cases of this character that the law does not permit private actions to be maintained on proof merely of a disturbance in the enjoyment of the common right, unless special damage is also shown, distinct not only in degree, but in kind, from that which is done to the whole public by the nuisance.

But there is another class of cases in which the essence of the wrong consists in an invasion of private right, and in which the public offense is committed, not merely by doing an act which causes injury, annoyance, and discomfort to one or several persons who may come within the sphere of its operation or influence, but by doing it

in such place and in such manner that the aggregation of private injuries becomes so great and extensive as to constitute a public annoyance and inconvenience, and a wrong against the community, which may be properly the subject of a public prosecution. But it has never been held, so far as we know, that in cases of this character the injury to private property, or to the health and comfort of individuals, becomes merged in the public wrong, so as to take away from the persons injured the right which they would otherwise have to maintain actions to recover damages which each may have sustained in his person or estate from the wrongful act.

Nor would such a doctrine be consistent with sound principle. Carried out practically, it would deprive persons of all redress for injury to property or health, or for personal annoyance and discomfort, in all cases where the nuisance was so general and extensive as to be a legitimate subject of a public prosecution; so that, in effect, a wrong-doer would escape all liability to make indemnity for private injuries by carrying on an offensive trade or occupation in such place and manner as to cause injury and annoyance to a sufficient number of persons to create a common nuisance.

The real distinction would seem to be this: That, when the wrongful act is of itself a disturbance or obstruction only to the exercise of a common and public right, the sole remedy is by public prosecution, unless special damage is caused to individuals. In such case, the act, of itself, does no wrong to individuals distinct from that done to the whole community. But when the alleged nuisance would constitute a private wrong, by injuring property or health, or creating personal inconvenience and annoyance, for which an action might be maintained in favor of a person injured, it is none the less actionable because the wrong is committed in a manner and under circumstances which would render the guilty party liable to indictment for a common nuisance. This, we think, is substantially the conclusion to be derived from a careful examination of the adjudged cases. The apparent conflict between them can be reconciled on the ground that an injury to private property, or to the health and comfort of an individual, is in its nature special and peculiar, and does not cause a damage which can properly be said to be common or public, however numerous may be the cases of similar damage arising from the same cause. Certainly, multiplicity of actions affords no good reason for denying a person all remedy for actual loss and injury which he may sustain in his person or property by the unlawful acts of another, although it may be a valid ground for refusing redress to individuals for a mere invasion of a common and public right.

The rule of law is well settled and familiar, that every man is bound to use his own property in such manner as not to injure the property of another, or the reasonable and proper enjoyment of it,

and that the carrying on of an offensive trade or business, which creates noisome smells and noxious vapors, or causes great and disturbing noises, or which otherwise renders the occupation of property in the vicinity inconvenient and uncomfortable, is a nuisance for which any person whose property is damaged or whose health is injured, or whose reasonable enjoyment of his estate as a place of residence is impaired or destroyed, thereby may well maintain an action to recover compensation for the injury. The limitations proper to be made in the application of this rule are accurately stated in *Bamford v. Turnley*, 3 Best & S. 66, and in *Tipping v. Smelting Co.*, 4 Best & S. 608-615, 11 H. L. Cas. 642, and cases there cited. See, also, in addition to cases cited by the counsel for the plaintiff, *Spencer v. Railway Co.*, 8 Sim. 193; *Soltau v. De Held*, 2 Sim. (N. S.) 133.

The instructions given to the jury were stated in such form as to lead them to infer that this action could not be maintained if it appeared that other owners of property in that neighborhood suffered injury and damage similar to that which was sustained by the plaintiff in her estate by the acts of the defendants. This, as applied to the facts in proof, was an error, and renders it necessary that the case should be tried anew.

Exceptions sustained.

(See also *Buchholz v. New York, L. E. & W. R. Co.*, 148 N. Y. 640, 43 N. E. 76, reported ante, on page 67. Additional cases of value are *Francis v. Schoellkopf*, 53 N. Y. 152; *Kavanagh v. Barber*, 131 N. Y. 211, 30 N. E. 235, 15 L. R. A. 689; *Cranford v. Tyrrell*, 128 N. Y. 341, 28 N. E. 514; *Brayton v. Fall River*, 113 Mass. 218, 18 Am. Rep. 470; *Railroad Co. v. Jones*, 111 Pa. 204, 2 Atl. 410, 56 Am. Rep. 260; *Crook v. Pitcher*, 61 Md. 510; *Sohn v. Cambern*, 106 Ind. 302, 6 N. E. 813; *Clark v. Peckham*, 10 R. I. 35, 14 Am. Rep. 654; *City of Chicago v. Building Ass'n*, 102 Ill. 379, 40 Am. Rep. 598; *Brown v. Watson*, 47 Me. 161, 74 Am. Dec. 482; *Holmes v. Corthell*, 80 Me. 31, 12 Atl. 730; *Mehrhof Bros. Brick Mfg. Co. v. Delaware, L. & W. R. Co.*, 51 N. J. Law, 56, 16 Atl. 12. As to what will be deemed sufficient special damage, resulting from the obstruction of a highway, to support a cause of action in tort, see *Wakeman v. Wilbur*, 147 N. Y. 657, 42 N. E. 341; *Knowles v. Pennsylvania R. Co.*, 175 Pa. 623, 34 Atl. 974, 52 Am. St. Rep. 860; *O'Brien v. Central Iron & Steel Co.*, 158 Ind. 218, 63 N. E. 302, 57 L. R. A. 508, 92 Am. St. Rep. 305; *Flynn v. Taylor*, 127 N. Y. 596, 28 N. E. 418, 14 L. R. A. 556.)

## V. LEGALIZED NUISANCE.

(136 Mass. 239, 49 Am. Rep. 27.)

SAWYER et al. v. DAVIS et al.

(Supreme Judicial Court of Massachusetts. Jan. 9, 1884.)

## 1. NUISANCE—LEGALIZED BY STATUTE.

The legislature may, by virtue of its police power, pass an act providing that manufacturers and others employing workmen may, for the purpose of giving notice to such employees, ring bells and use whistles and gongs of such size and weight, in such manner, and at such hours, as the municipal authorities may designate, though their use of such bells, whistles, and gongs operates to the injury of individuals, which otherwise a court of equity would restrain.

## 2. SAME—EFFECT OF PRIOR INJUNCTION.

An injunction restraining the ringing of a factory bell, used to notify employees, before a certain hour in the morning, does not give a vested right which the legislature is powerless to take away by a statute legalizing the ringing of such bell before that hour, and on a bill of review in such case the injunction will be dissolved.

Case reserved.

Bill of review. Plaintiffs, manufacturers of Plymouth, were, on October 1, 1881, restrained by a decree of this court, on a bill in equity by defendants, from ringing the bell on their mill before the hour of 6:30 a. m. *Davis v. Sawyer*, 133 Mass. 289, 43 Am. Rep. 519. March 28, 1883, the legislature passed an act providing that "manufacturers and others employing workmen are authorized, for the purpose of giving notice to such employees, to ring bells and use whistles and gongs of such size and weight, in such manner, and at such hours, as the board of aldermen of cities and the selectmen of towns may in writing designate." St. Mass. 1883, c. 84. Under such statute the selectmen of the town licensed plaintiffs to ring their bell at 5 a. m. The bill prayed a dissolution or modification of the injunction to enable plaintiffs to act under their license. Defendants demurred to the bill, claiming that the statute was unconstitutional so far as applicable to defendants. At the hearing before Colburn, J., he reserved the case for the consideration of the full court.

C. ALLEN, J. Nothing is better established than the power of the legislature to make what are called "police regulations," declaring in what manner property shall be used and enjoyed, and business carried on, with a view to the good order and benefit of the community, even although they may to some extent interfere with the full enjoyment of private property, and although no compensation is given to a person so inconvenienced. *Bancroft v. Cambridge*, 126 Mass. 438-441. In most instances, the illustrations of the proper

exercise of this power are found in rules and regulations restraining the use of property by the owner in such manner as would cause disturbance and injury to others. But the privilege of continuing in the passive enjoyment of one's own property, in the same manner as formerly, is subject to a like limitation; and with the increase of population in a neighborhood, and the advance and development of business, the quiet and seclusion and customary enjoyment of homes are necessarily interfered with, until it becomes a question how the right which each person has of prosecuting his lawful business, in a reasonable and proper manner, shall be made consistent with the other right which each person has to be free from unreasonable disturbance in the enjoyment of his property. *Merrifield v. Worcester*, 110 Mass. 216, 219, 14 Am. Rep. 592. In this conflict of rights, police regulations by the legislature find a proper office in determining how far, and under what circumstances, the individual must yield, with a view to general good. For example, if, in a neighborhood thickly occupied by dwelling-houses, any one, for his own entertainment or the gratification of a whim, were to cause bells to be rung and steam-whistles to be blown to the extent that is usual with the bells and steam-whistles of locomotive engines near railroad stations in large cities, there can be no doubt that it would be an infringement of the rights of the residents, for which they would find ample remedy and vindication in the courts. But if the legislature, with a view to the safety of life, provides that bells shall be rung and whistles sounded, under those circumstances, persons living near by must necessarily submit to some annoyance from this source, which otherwise they would have a right to be relieved from.

It is ordinarily a proper subject for legislative discretion to determine by general rules the extent to which those who are engaged in customary and lawful necessary occupations shall be required or allowed to give signals or warnings by bells or whistles, or otherwise, with a view either to the public safety, as in the case of railroads, or to the necessary or convenient operation and management of their own works; and ordinarily such determination is binding upon the courts, as well as upon citizens generally. And when the legislature directs or allows that to be done which would otherwise be a nuisance, it will be valid, upon the ground that the legislature is ordinarily the proper judge of what the public good requires, unless carried to such an extent that it can fairly be said to be an unwholesome and unreasonable law. *Bancroft v. Cambridge*, 126 Mass. 441. It is accordingly held in many cases, and is now a well-established rule of law, at least in this commonwealth, that the incidental injury which results to the owner of property situated near a railroad, caused by the necessary noise, vibration, dust, and smoke from the passing trains, which would clearly amount to an actionable nuisance if the operation of the railroad were not authorized by the

legislature, must, if the running of the trains is so authorized, be borne by the individual, without compensation or remedy in any form. The legislative sanction makes the business lawful, and defines what must be accepted as a reasonable use of property and exercise of rights on the part of the railroad company, subject always to the qualification that the business must be carried on without negligence or unnecessary disturbance of the rights of others. And the same rule extends to other causes of annoyance which are regulated and sanctioned by law. *Presbrey v. Railway*, 103 Mass. 1, 6, 7; *Walker v. Railway*, Id. 10-14, 4 Am. Rep. 509; *Bancroft v. Cambridge*, 126 Mass. 441; *Call v. Allen*, 1 Allen, 137; *Com. v. Chemical Works*, 16 Gray, 231-233; *Struthers v. Railway*, 87 Pa. 282; *Hatch v. Railroad*, 28 Vt. 142, 147; *Brand v. Railway*, L. R. 1 Q. B. 130, L. R. 2 Q. B. 223, L. R. 4 H. L. 171; *Vaughan v. Railway*, 5 Hurl. & N. 679, 685, 687; *Rex v. Pease*, 4 Barn. & Adol. 30; *Sedg. St. & Const. Law*, 435, 436.

The recent case of *Baltimore & P. R. Co. v. Fifth Baptist Church*, 108 U. S. 317, 2 Sup. Ct. 719, 27 L. Ed. 739, is strongly relied on by the defendants as an authority in their favor. There are, however, two material and decisive grounds of distinction between that case and this. There the railroad company had only a general legislative authority to construct works necessary and expedient for the proper completion and maintenance of its railroad, under which authority it assumed to build an engine-house and machine-shop close by an existing church, and it was held that it was never intended to grant a license to select that particular place for such works, to the nuisance of the church. Moreover, in that case, the disturbance was so great as not only to render the church uncomfortable, but almost unendurable, as a place of worship, and it virtually deprived the owners of the use and enjoyment of their property. We do not understand that it was intended to lay down, as a general rule applicable to all cases of comparatively slight, though real, annoyance, naturally and necessarily resulting, in a greater or less degree, to all owners of property in the neighborhood, from a use of property, or a method of carrying on a lawful business which clearly falls within the terms and spirit of a legislative sanction, that such sanction will not affect the claim of such owner to relief, but, rather, that the court expressly waived the expression of an opinion upon the point.

In this commonwealth, as well as in several of the United States and in England, the cases already cited show that the question is settled by authority, and we remain satisfied with the reasons upon which the doctrine was here established. Courts are compelled to recognize the distinction between such serious disturbances as existed in the case referred to and comparatively slight ones, which differ in degree only, and not in the kind, from those suffered by others in the same vicinity. Slight infractions of the natural rights of

the individual may be sanctioned by the legislature, under the proper exercise of the police power, with a view to the general good. Grave ones will fall within the constitutional limitation that the legislature is only authorized to pass reasonable laws. The line of distinction cannot be so laid down as to furnish a rule for settling all cases in advance. The difficulty of marking the boundaries of this legislative power, or of prescribing limits to its exercise, was declared in *Com. v. Alger*, 7 Cush. 53, 85, and is universally recognized. Courts, however, must determine the rights of parties in particular cases as they arise; always recognizing that the ownership of property does not of itself imply the right to use or enjoy it in every possible manner, without regard to corresponding rights of others as to the use and enjoyment of their property; and also that the rules of the common law, which have from time to time been established, declaring or limiting such rights of use and enjoyment, may themselves be changed as occasion may require. *Munn v. Illinois*, 94 U. S. 113-134, 24 L. Ed. 77.

In the case before us, looking at it for the present without regard to the decree of this court in the former case between these parties, we find nothing in the facts set forth which show that the statute relied on, as authorizing the plaintiffs to ring their bell (St. 1883, c. 84), should be declared unconstitutional. It is virtually a license to manufacturers, and others employing workmen, to carry on their business in a method deemed by the legislature to be convenient, if not necessary, for the purpose of giving notice, by ringing bells and using whistles and gongs, in such manner and at such times as may be designated in writing by municipal officers. In character it is not unlike numerous other instances to be found in our statutes, where the legislature has itself fixed, or has authorized municipal or other boards or officers to fix, the places, times, and methods in which occupations may be carried on, or acts done, which would naturally be attended with annoyance to individuals. The example of bells and whistles on locomotive engines has already been mentioned. Reference may also be made to the statutes regulating the use of stationary steam-engines, the places and manner of manufacturing or keeping petroleum, of carrying on other offensive trades and occupations, of storing gunpowder, and of establishing hospitals, stables, and bowling-alleys.

The defendants, however, contend that a different question arises in the present case, where the plaintiffs rely upon a legislative sanction given to acts after it had been determined by this court that the doing of them was attended with a peculiar injury to the defendants, which entitled them to a remedy as for a nuisance. There can be no doubt that such sanction would be a good defense to an indictment for a nuisance; or to a proceeding instituted by an individual, whose only grievance was that he had sustained special damage in

consequence of being disturbed in the enjoyment of some public right, such as a right to travel upon a highway or river. His public right may clearly be regulated and controlled by the legislature after a decision by the court as well as before. *Com. v. Essex Co.*, 13 Gray, 239, 247. But the argument is urged upon us with great force that in the present case there had been a judicial determination that the ringing of the bell, at the hours now authorized by the terms of the statute and the designation of the selectmen, was a private nuisance to the defendants, not growing out of any public right, and that the statute ought not, as a matter of construction, to be held applicable to this case; or, if such is its necessary construction, that it is unconstitutional, as interfering with their vested rights. In the first place, we can have no doubt that the statute, by its just construction, is in its terms applicable to the present case. It is undoubtedly true that neither a general authority nor a particular license is to be so construed as to be held to sanction what was not intended to be sanctioned. A general authority is not necessarily to be treated as a particular license (*Com. v. Kidder*, 107 Mass. 188); and in some cases, even where a particular license or authority has been given, as to keep an inn, ale-house, or slaughter-house in a particular place, which is specified, this authority has not been deemed to sanction the keeping of it in an improper manner. *Rex v. Cross*, 2 Car. & P. 483; *Com. v. McDonough*, 13 Allen, 581, 584; *State v. Mullikin*, 8 Blackf. 260; *U. S. v. Elder*, 4 Cranch, C. C. 507, Fed. Cas. No. 15,039. And, ordinarily, a statute which authorizes a thing to be done, which can be done without creating a nuisance, will not be deemed to authorize a nuisance. In such cases it is not to be assumed that it was contemplated by the legislature that what was so authorized would have the necessary effect to create a nuisance, or that it would be done in such a manner as to create a nuisance; and, if a nuisance is created, there will in such cases ordinarily be a remedy at law or in equity. *Eames v. Worsted Co.*, 11 Metc. (Mass.) 570; *Haskell v. New Bedford*, 108 Mass. 208, 215; *Com. v. Kidder*, 107 Mass. 188. But, on the other hand, the authority to do an act must be held to carry with it whatever is naturally incidental to the ordinary and reasonable performance of that act. When the legislature authorized factory bells to be rung, it must have been contemplated that they would be heard in the neighborhood. That is a natural and inevitable consequence. The legislature must be deemed to have determined that the benefit is greater than the injury and annoyance, and to have intended to enact that the public must submit to the disturbance for the sake of the greater advantage that would result from this method of carrying on the business of manufacturing. It must be considered, therefore, in this case, that a legislative sanction has been given to the very act which this court found to create a private nuisance. It is then argued that the legis-

lature cannot legalize a nuisance, and cannot take away the rights of the defendants as they have been ascertained and declared by this court; and this is undoubtedly true, so far as such rights have become vested. For example, if the plaintiff, under an existing rule of law, has a right of action to recover damages for a past injury suffered by him, his remedy cannot be cut off by an act of the legislature. So, also, if, in a suit in equity to restrain the continuance of a nuisance, damages have been awarded to him, or costs of suit, he would have an undoubted right to recover them, notwithstanding the statute. But, on the other hand, the legislature may define what in the future shall constitute a nuisance, such as will entitle a person injured thereby to a legal or equitable remedy, and may change the existing common-law rule upon the subject. It may declare, for the future, in what manner a man may use his property or carry on a lawful business without being liable to an action in consequence thereof; that is, it may define what shall be a lawful and reasonable mode of conduct. This legislative power is not wholly beyond the control of the courts, because it is restrained by the constitutional provision limiting it to wholesome and reasonable laws, of which the court is the final judge; but, within this limitation, the exercise of the police power of the legislature will apply to all within the scope of its terms and spirit. The fact that the rights of citizens, as previously existing, are changed, is a result which always happens. It is, indeed, in order to change those rights that the police power is exercised. So far as regards the rights of parties accruing after the date of the statute, they are to be governed by the statute. Their rights existing prior to that date are not affected by it. To illustrate this view, let it be supposed that the case between the present parties in its original stage had been determined in favor of the manufacturers, under which decision they would have had a right to ring their bell; and that afterwards a statute had been passed providing that manufacturers should not ring bells, except at such hours as might be approved by the selectmen; and that these manufacturers had then proceeded to ring their bell at other hours not included in such approval. It certainly could not be said that they had a vested right to do so, under the decision of the court.

The injunction which was awarded by the court, upon the facts which appeared at the hearing, did not imply a vested right in the present defendants to have it continued permanently. Though a final determination of the case before the court, and though binding and imperative upon the present plaintiffs, and enforceable against them by all the powers vested in a court of equity, yet they were at liberty at any time, under new circumstances making it inequitable for it to be longer continued, to apply to the court for a review of the case and a dissolution of the injunction. In respect to such a state of facts, an injunction can never be said to be final, in the sense that

it is absolute for all time. Even without any new legislation affecting the rights of the parties, with an increase of their own business, and a general increase of manufacturing and other business in the vicinity, and of a general and pervading change in the character of the neighborhood, it might be very unreasonable to continue an injunction which it was in the first instance entirely reasonable and proper to grant. The ears of the court could not, under such new circumstances, be absolutely shut to an application for its modification without any new statute declaring the policy of the commonwealth in respect to any branch of business or employment. But a declaration by the legislature that, in its judgment, it is reasonable and necessary for certain branches of business to be carried on in particular ways, notwithstanding the incidental disturbance and annoyance to citizens, is certainly a change of circumstances which is entitled to the highest consideration of the court; and in the present case we cannot doubt that it is sufficient to entitle the plaintiffs to relief from the operation of the injunction.

The method of procedure to which the plaintiffs have resorted is the usual and proper one in such circumstances. 2 Daniell's Ch. Pl. (4th Amer. Ed.) 1577, note 3; Story, Eq. Pl. § 404 et seq.; Clapp v. Thaxter, 7 Gray, 384. And, for authorities tending to show that the plaintiffs are entitled to the relief which they seek in consequence of a subsequent statute changing the rights of the parties, see *Pennsylvania v. Bridge Co.*, 18 How. 421, 15 L. Ed. 435; *In re Clinton Bridge*, 10 Wall. 454, 463, 19 L. Ed. 969; *Gilman v. Philadelphia*, 3 Wall. 713, 732, 18 L. Ed. 96; *South Carolina v. Georgia*, 93 U. S. 4, 12, 23 L. Ed. 782; *Bridge Co. v. U. S.*, 105 U. S. 470, 480, 26 L. Ed. 1143; *Com. v. Railroad Co.*, 14 Gray, 93, 97; *Bartholomew v. Harwinton*, 33 Conn. 408.

Demurrer overruled.

(See also *Cogswell v. Railroad Co.*, 103 N. Y. 10, 8 N. E. 537, 57 Am. Rep. 701; *Miller v. Mayor, etc.*, 109 U. S. 385, 3 Sup. Ct. 228, 27 L. Ed. 971; *Baltimore & P. R. Co. v. Fifth Baptist Church*, 108 U. S. 317, 2 Sup. Ct. 719, 27 L. Ed. 739; *Village of Pine City v. Munch*, 42 Minn. 342, 44 N. W. 197, 6 L. R. A. 763; *Railroad Co. v. Truman*, L. R. 11 App. Cas. 45. When the power given by statute is exceeded and the excess causes the nuisance, the party injured has a remedy; and so if the legislative authority could be exercised without causing a nuisance, and yet it is so carried into effect that a nuisance is occasioned. *Id.*, *Morton v. Mayor of New York*, 140 N. Y. 207, 35 N. E. 490, 22 L. R. A. 241; *Delaware, L. & W. R. Co. v. Buffalo*, 158 N. Y. 266, 53 N. E. 44; *McAndrews v. Colliard*, 42 N. J. Law, 189, 36 Am. Rep. 508. Sometimes the authority given practically necessitates a "taking" of another's property, and in such cases there must be compensation paid under the doctrine of "eminent domain." *Garvey v. Long Island R. Co.*, 159 N. Y. 323, 54 N. E. 57, 70 Am. St. Rep. 550; *Long Island R. Co. v. Garvey*, 159 N. Y. 334, 54 N. E. 60; *Pennsylvania R. Co. v. Angel*, 41 N. J. Eq. 316, 7 Atl. 432, 56 Am. Rep. 1; cf. *Beseman v. Pennsylvania R. Co.*, 50 N. J. Law, 235, 245, 13 Atl. 164, affirmed 52 N. J. Law, 221, 20 Atl. 169; *Lincoln v. Com.*, 164 Mass. 368, 374, 41 N. E. 489.)

## VI. ABATEMENT OF NUISANCE.

(11 Mees. & W. 176.)

JONES v. WILLIAMS.

(Court of Exchequer. January 28, 1843.)

### 1. NUISANCE—ABATEMENT—NOTICE TO REMOVE.

A person has no right to enter upon the land of another to abate a nuisance of filth, without previous request or notice to the occupant to remove it, unless it appears that such occupant was the original wrong-doer by placing it there, or possibly that it arises from a default in the performance of some duty or obligation incumbent upon him, or that the nuisance is immediately dangerous to life or health, rendering it unsafe to wait.

### 2. SAME.

Such request or notice to the occupant is necessary, if, when he acquired possession of the land, the nuisance already existed upon it, and he simply omitted to remove it.

Rule to show cause why judgment should not be entered for plaintiff non obstante veredicto.

Action of trespass to land brought by Jones against Williams. Defendant by his plea justified the entry to abate a nuisance of filth permitted by plaintiff upon his adjoining lands. The verdict was for defendant. Plaintiff obtained a rule to show cause why judgment should not be entered in his favor non obstante veredicto.

PARKE, B. A rule was obtained in this case by Mr. Erle for judgment non obstante veredicto on the fourth plea found for the defendant, and argued a few days ago. This plea, to an action of trespass quare clausum fregit, stated that the defendant, before and at the said time when, etc., was possessed of a dwelling-house near the locus in quo, and dwelt therein; and that the plaintiff, before and at, etc., injuriously and wrongfully permitted and suffered large quantities of dirt, filth, manure, compost, and refuse to be, remain, and accumulate on the locus in quo, by reason whereof divers noxious, offensive, and unwholesome smells, etc., came from the close into the defendant's dwelling-house; and then the defendant justifies the trespass by entering in order to abate the nuisance, and in so doing damaging the wall, and digging up the soil. The question for us to decide is whether this plea is bad after verdict, and we are of opinion that it is. The plea does not state in what the wrongful permission of the plaintiff consisted; whether he was a wrong-doer himself, by originally placing the noxious matter on his close, and afterwards permitting it to continue; or whether it was placed by another, and he omitted to remove it; or whether he was under an obligation, by prescriptive usage or otherwise, to cleanse the place

where the nuisance was, and he omitted to discharge that obligation, whereby the nuisance was created. The proof of any of these three circumstances would have supported the plea; and if in none of the three cases a notice to remove the nuisance was necessary before an entry could take place, the plea is good; but if notice was necessary in any one, the plea is bad, by reason of its neither containing an averment that such a notice was given, nor showing that the continuance was of such a description as not to require one.

It is clear that if the plaintiff himself was the original wrong-doer, by placing the filth upon the locus in quo, it might be removed by the party injured, without any notice to the plaintiff; and so, possibly, if by his default in not performing some obligation incumbent on him, for that is his own wrong also; but if the nuisance was levied by another, and the defendant succeeded to the possession of the locus in quo afterwards, the authorities are in favor of the necessity of a notice being given to him to remove, before the party aggrieved can take the law into his own hands.

We do not rely on the decision in *Earl of Lonsdale v. Nelson*, 2 Barn. & C. 302, 3 Dow. & R. 556, as establishing the necessity of notice in such a case, for there much more was claimed than a right to remove a nuisance, viz., a right to construct a work on the plaintiff's soil, which no authority warranted; but Lord Wynford's dictum is in favor of this objection, for he states that a notice is requisite in all cases of nuisance by omission, and the older authorities fully warrant that opinion, where the omission is the non-removal of a nuisance erected by another. *Penruddock's Case*, 5 Coke, 101a, shows that an assize of quod permittat prosternere would not lie against the alienee of the party who levied it, without notice. The judgment in that case was affirmed on error; and in the king's bench, on the argument, the judges of that court agreed that the nuisance might be abated, without suit, in the hands of the feoffee—that is, as it should seem, with notice; for in *Jenkin's Sixth Century Case*, 57 (no doubt referring to *Penruddock's Case*), the law is thus stated: "A builds a house so that it hangs over the house of B, and is a nuisance to him. A makes a feoffment of his house to C, and B a feoffment of his house to D, and the nuisance continues. Now, D cannot abate the said nuisance, or have a quod permittat for it, before he makes a request to C to abate it, for C is a stranger to the wrong. It would be otherwise if A continued his estate, for he did the wrong. If nuisances are increased after several feoffments, these increases are new nuisances, and may be abated without request." We think that a notice or request is necessary, upon these authorities, in the case of a nuisance continued by an alienee; and therefore the plea is bad, as it does not state that such a notice was given or request made, nor that the plaintiff was himself the wrong-doer,

by having levied the nuisance, or neglected to perform some obligation by the breach of which it was created.

ABINGER, C. B., observed that it might be necessary in some cases, where there was such immediate danger to life or health as to render it unsafe to wait, to remove without notice, but then it should be so pleaded; in which the rest of the court concurred.

Rule absolute.

(The owner of land which is overhung by trees growing on his neighbor's land is entitled, without notice, if he does not trespass on his neighbor's land, to cut the branches so far as they overhang, though they have done so for more than twenty years. *Lemmon v. Webb* [1894] A. C. 1; cf. *Hickey v. Michigan Cent. R. Co.*, 96 Mich. 498, 55 N. W. 989, 21 L. R. A. 729, 35 Am. St. Rep. 621; *Countryman v. Lighthill*, 24 Hun, 405.

Whoever, in abating an alleged nuisance, destroys or injures private property, or interferes with private rights, acts at his peril, and will be held liable, unless, when his act is challenged in court, it appears that the thing abated was in fact a nuisance. *People v. Board of Health*, 140 N. Y. 1, 35 N. E. 320, 37 Am. St. Rep. 522; *Graves v. Shattuck*, 35 N. H. 257, 69 Am. Dec. 536; *Cole v. Kegler*, 64 Iowa, 59, 19 N. W. 843; *Fields v. Stokley*, 99 Pa. 306, 44 Am. Rep. 109.)

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(18 R. I. 473, 28 Atl. 968.)

STATE v. WHITE et al. (in part).

(Supreme Court of Rhode Island. February 17, 1894.)

**PUBLIC NUISANCE—SPECIAL INJURY—ABATEMENT BY PRIVATE PERSON—MUST BE NO BREACH OF THE PEACE.**

On trial on indictment for assault with intent to kill, it appeared that A maintained a gate across a highway leading to a beach where defendant W had a seaweed privilege, and tried to prevent defendants, who came there with the intention of forcing the gate in case of resistance, from going through on their way to the beach, whereupon defendants forced the gate and provoked a fight, resulting in injuries to A, for assaulting whom defendants were indicted. *Held*, that although A was maintaining a public nuisance, which was a source of special injury to W, defendants were not justified in causing a breach of the peace to overcome his resistance.

Prosecution against Isaac White and Emerson Ash. Defendants were convicted, and petitioned for a new trial. Petition denied.

TILLINGHAST, J. This is an indictment against the defendants, charging an assault on one Samuel E. Almy, with intent to kill and murder. At the trial of the case in the court of common pleas the defendants were found guilty of an assault with a dangerous weapon, and they now petition for a new trial on the ground that the verdict is against the evidence, and that the presiding justice erred in his rulings of law and in his instructions to the jury.

Briefly summarized, the evidence submitted shows that the defendants were lawfully on a public highway, going to the beach, to collect White's property, the seaweed which was there; that said Almy had illegally obstructed the highway by maintaining the gate across the same, which was a public nuisance, and which specially damnified the defendant White; that Almy refused to allow the gate to be opened, and aggressively defended the same by holding it to prevent it from being opened, and attacking the vehicle and the oxen of the defendants, while the latter were striving to force their way through; and that during or immediately after the removal of said obstruction in the manner aforesaid, a personal encounter ensued between the defendants and Almy, in which the latter received the injuries complained of, and also in which, according to defendants' testimony, White was knocked down and rendered insensible by Almy, and Ash was also beaten by him with a stick.

The first question which arises in view of this state of facts is whether the presiding justice erred in his refusal to instruct the jury as requested by the defendants' counsel: (1) "That if the jury finds that the defendants and their cart were on this highway intending to take the most direct track to the beach and salt water for their seaweed, and that Almy interrupted them, Almy, and not they, was the aggressor;" (2) "that if the jury find that these parties were attacked while upon a public highway of the state, Almy, and not they, was the aggressor." The answer to this question depends upon the correctness of the defendants' contention as to their legal right to remove said obstruction by force, while the complainant was present and actively defending the same. If they had this right, then Almy, and not they, was the aggressor, and said request to charge should have been granted; otherwise not. We think it is well settled, notwithstanding some decisions and dicta to the contrary, that a private person may not, of his own motion, abate a strictly public nuisance. *Dimes v. Petley*, 15 Q. B. 276; *Brown v. Perkins*, 12 Gray, 89; *Griffith v. McCullum*, 46 Barb. 561; *Wood, Nuis.* §§ 729-737, and cases cited; *Bowden v. Lewis*, 13 R. I. 189. It is also equally well settled that a private person may, of his own motion, abate a public nuisance, where the existence thereof is a source of special injury to him, provided he can do so without a breach of the peace. 3 Bl. Comm. 5; 16 Am. & Eng. Enc. Law, 990-994, and cases cited; *State v. Keeran*, 5 R. I. 497, 510; *Clark v. Ice Co.*, 24 Mich. 508; *Mayor of Colchester v. Brooke*, 7 Q. B. 339; *Rung v. Shoneberger*, 2 Watts, 23, 26 Am. Dec. 95; 4 Wait, Act. & Def. 778, and cases cited; *Day v. Day*, 4 Md. 262, 270; *State v. Flannagan*, 67 Ind. 140. In *Cooley on Torts* (2d Ed. pp. 48, 49) the law is well stated as follows: "The question who may abate a nuisance may depend upon whether the nuisance is public or private. If it is a private nuisance, he only can abate it who is injured

by its continuance; if it is a public nuisance, he only may abate it who suffers a special grievance, not felt by the public in general. Therefore, if one places an obstruction in a public street, an individual who is incommoded by it may remove it; but unless he has occasion to make use of the highway, he must leave the public injury to be redressed by the public authorities. It is the existence of an emergency which justifies the interference of the individual. In permitting this redress, certain restrictions are imposed to prevent abuse or unnecessary injury. One of these is that the right must not be exercised to the prejudice of the public peace. Therefore, if the abatement is resisted, it becomes necessary to seek in the courts the ordinary legal remedies."

This being the law, the question which naturally arises is, did the defendants commit a breach of the peace in the abatement of the nuisance in question? We think they did. They went with the evident intention of breaking open the gate by overcoming whatever force Almy might oppose to them. They were armed with a pitchfork, a hoe, and a pistol. They used violent and profane language in a public highway, in the presence of at least six persons. They backed their team against the gate while Almy and Hussey were on the opposite side thereof, the latter holding the gate, and the former striving to prevent the cart from going through. They provoked a quarrel, and brought on a personal encounter. In short, they went to the place in question prepared for, and evidently expecting, a fight in connection with the abatement of the nuisance, and they were not disappointed. They took the law into their own hands, and in doing so they acted at their peril. That Almy was in the wrong, and liable to indictment for maintaining the nuisance, as well as for the use of violence against the defendants, may be assumed; but this fact did not justify the defendants in committing a breach of the peace in abating it, the public peace being of more importance than the assertion of the defendants' right to use said highway. We are therefore of the opinion that the defendants, and not Almy, were the aggressors in the affray referred to, and hence that the presiding justice properly refused to charge as requested.

Petition for a new trial denied and dismissed.

(As to causing a breach of the peace, see also *Turner v. Holtzman*, 54 Md. 148, 39 Am. Rep. 361; *People v. Severance*, 125 Mich. 556, 84 N. W. 1088, 51 L. R. A. 461, 84 Am. St. Rep. 584.

"The general proposition has been asserted in text-books, and repeated in judicial opinions, that any person may abate a public nuisance. But the best considered authorities in this country and in England now hold that a public nuisance can only be abated by an individual where it obstructs his private right, or interferes at the time with his enjoyment of a right common to many, as the right of passage upon the public highway, and he thereby sustains a special injury." *Lawton v. Steele*, 119 N. Y., at page 237, 23 N. E. 880, 7 L. R. A. 134, 16 Am. St. Rep. 813. See, to the same effect, *Corthell v. Holmes*, 87 Me. 24, 32 Atl. 715; *Brown v. De Groff*, 50 N. J. Law, 409, 14 Atl. 219, 7 Am. St. Rep. 794; *People v. Severance*, *supra*; *Wolfe v.*

Pearson, 114 N. C. 621, 19 S. E. 264; Griffith v. Holman, 23 Wash. 347, 63 Pac. 239, 54 L. R. A. 178, 83 Am. St. Rep. 821; Harrower v. Ritson, 37 Barb. 301; Godsell v. Fleming, 59 Wis. 52, 17 N. W. 679.)

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(65 Me. 426, 20 Am. Rep. 711.)

**BRIGHTMAN et al. v. INHABITANTS OF BRISTOL (In part).**

(Supreme Judicial Court of Maine. August 31, 1876.)

**1. NUISANCE—ABATEMENT.**

That a porgy oil factory, not in itself unlawful, becomes a nuisance on account of its location and the almost unbearable smells which it produces, does not justify its destruction by a mob on their own responsibility, even though there is a statute in force which gives the power to abate such a nuisance, after conviction upon due process of law.

**2. SAME—REMEDY.**

Where a nuisance consists of the use of a building, the proper method to abate it is to stop that use, and not to destroy the building itself.

APPLETON, C. J. This is an action on the case, under Rev. St. 1857, c. 123, § 8, to recover three-fourths of the value of a porgy oil factory, alleged to have been burnt and destroyed by a mob on 29th April, 1868. A verdict was rendered in favor of the plaintiffs, and the case comes before us upon exceptions to the rulings of the presiding justice.

The defendants' counsel offered to show that strong and offensive odors arose from the plaintiff's factory, and that it was a public nuisance, and a nuisance to those residing in its vicinity, but all evidence to show the factory a nuisance was excluded.

It may be conceded that the factory is a nuisance, within the provisions of Rev. St. 1857, c. 17, § 1, and that the noxious exhalations, offensive smells, and stench arising from its operations approximate to the unbearable. But the manufacture is not, in and of itself, unlawful. It is not prohibited. It is sanctioned, if carried on in a place which has been duly assigned for such manufacture. The statute does not require the destruction of the buildings or of the machinery used in its operations, but that the business should not be carried on at a place where from its location it would be a nuisance. The statute, giving the power of abatement after conviction upon due process, does not in addition confer upon an irresponsible public the right to enforce the penalties it establishes without process of law. A lawful business may so be carried on as to become a nuisance. Undoubtedly in certain cases and under certain limitations nuisances may be abated by those specially aggrieved thereby. But when the subject-matter of complaint is lawful per se, and the nuisance consists not in the business itself, but in the unsuitable place in which it is carried on, its abatement must be by the judgment of

the court, and by the officers of the law carrying into effect such judgment, and not by the blind fury of a tumultuous mob. Only so much must be abated as constitutes the nuisance. If it consists in the use of a building, such use must be prohibited and punished. If the location is what constitutes the nuisance, it must be removed. A smith's forge, in *Bradley v. Gill*, *Lutw.* [29]; a tobacco mill, in *Jones v. Powell*, *Hut.* 136; a manufactory for spirits of sulphur, in *White's Case*, 1 *Burr.* 333; a distillery, in *Smiths v. McConathy*, 11 *Mo.* 517; a slaughter house, in *Brady v. Weeks*, 3 *Barb.* 157; a livery stable, in *Coker v. Birge*, 10 *Ga.* 336; a melting house, in *Peck v. Elder*, 3 *Sandf.* 126; a gaming house or grog shop, in *State v. Paul*, 5 *R. I.* 185; a powder magazine, in *Cheatham v. Shearon*, 1 *Swan*, 213; a blacksmith shop, in *Norcross v. Thoms*, 51 *Me.* 503, 81 *Am. Dec.* 588; a tallow factory, in *Allen v. State*, 34 *Tex.* 230; a tannery, in *Rex v. Pappineau*, 1 *Strange*, 686—have been declared nuisances, because of their unsuitable location, but that will not justify a riotous mob in burning and destroying them. A tomb erected upon one's own land is not necessarily a nuisance; but it may become such from its location. *Barnes v. Hathorn*, 54 *Me.* 125. But it is not, therefore, to be destroyed. Its use may be prohibited. The plaintiffs' porgy oil factory stands upon the same ground.

These views are sustained by an almost unbroken series of decisions. In *Barclay v. Com.*, 25 *Pa.* 503, 64 *Am. Dec.* 715, the nuisance for which the defendant was indicted was the maintenance and continuance of a barn near to and above a spring reserved for the inhabitants of Bedford for supplying their general pump with water; and the indictment charged that by storing hay and feeding cattle the water of the spring was rendered impure, corrupted, and unfit for use. Upon the question whether the sheriff should abate the nuisance by removing the barn, *Woodward, J.*, says: "The offense lay in the use made of the barn and yard in close proximity to the spring, and the nuisance would be effectually abated by discontinuing such use. When an erection or structure itself constitutes the nuisance, as when it is put up in a public street, its demolition or removal is necessary to the abatement of the nuisance; but when the offense consists in a wrongful use of a building, harmless in itself, the remedy is to stop such use, not to tear down or remove the building itself." In *Gray v. Ayres*, 7 *Dana*, 375, 32 *Am. Dec.* 107, it was held that what constitutes the nuisance should be abated, but not by the destruction of the house, the use of which and the practices therein constituted the nuisance, and not the house itself. "Although," remarks *Marshall, J.*, "the destruction of the house might have been the most effectual mode of suppressing the nuisance, yet the house itself was not a nuisance, nor necessarily the cause of one, its destruction was not a necessary means of abating the nuisance, and as the right of abating is confined to that which is the nuisance.

or which actually produces or must necessarily produce it, the right upon the case made out in the plea did not extend to the destruction of the house." The same views are fully sustained in Massachusetts by the opinion of Shaw, C. J., in *Brown v. Perkins*, 12 Gray, 89, and in Rhode Island by that of Ames, C. J., in *State v. Paul*, 5 R. I. 185.

When it is the use of the building which constitutes the nuisance, the abatement consists in putting a stop to such use. The law allows its officers, in execution of its sentence only, to do what is necessary to abate the nuisance and nothing more; a fortiori, it will not sanction destruction without limit by individuals. It would be absurd to hold that a manufactory lawful in itself, but producing "offensive smells," is at the mercy of every passer-by whose olfactory nerves are disagreeably affected by its necessary processes.

Exceptions overruled.

(See, to the same effect, *Welch v. Stowell*, 2 Doug. 332; *Moody v. Supervisors of Niagara Co.*, 46 Barb. 659; *Ely v. Supervisors of Niagara Co.*, 36 N. Y. 297; *Health Dept. v. Dassori*, 21 App. Div. 348, 47 N. Y. Supp. 641; *Id.*, 159 N. Y. 245, 54 N. E. 13; *Larson v. Furlong*, 50 Wis. 681, 8 N. W. 1; *Id.*, 63 Wis. 323, 23 N. W. 584.

When one enters upon the land of another to abate a nuisance, he must do it in the way least injurious to the owner of the land entered. *Roberts v. Rose*, 4 H. & C. 103. When a person who is entitled to a limited right exercises it in excess, so as to produce a nuisance, it may be abated to the extent of the excess; but if the nuisance cannot be abated without obstructing the right altogether, the exercise of the right may be entirely stopped until means have been taken to reduce it within its proper limits. *Crosland v. Borough of Pottsville*, 126 Pa. 511, 18 Atl. 15, 12 Am. St. Rep. 891. "Thus, if a man has a right to send clean water through my drain, and chooses to send dirty water, every particle of the water may be stopped, because it is dirty." *Charles v. Finchley Board*, L. R. 23 Ch. Div. 767, 775; *Beard v. Murphy*, 37 Vt. 99, 86 Am. Dec. 693.)

## INJURIES BY ANIMALS.

(73 N. Y. 195, 29 Am. Rep. 123.)

MULLER v. McKESSON et al. (In part).

(Court of Appeals of New York. April 2, 1878.)

## 1. VICIOUS ANIMALS—LIABILITY FOR INJURIES.

A person keeping a mischievous or vicious animal, with knowledge of its propensities, is bound to keep it secure at his peril. He cannot excuse himself from liability for injuries inflicted by it by proof of due care.

## 2. SAME—NEGLIGENCE OF CO-SERVANT.

The negligence of a servant in loosing his master's ferocious dog is no defense to an action for the injury caused by the dog to a fellow-servant, as the gravamen of the action is the keeping of a ferocious animal with knowledge of its nature, and not the negligent care of it.

## 3. SAME—NEGLIGENCE OF PERSON INJURED.

If a person, with full knowledge of the evil propensities of an animal, wantonly excites it, or voluntarily and unnecessarily puts himself in the way of such animal, he cannot recover for the injuries thereby sustained by him, but the owner will not be excused by slight negligence or want of ordinary care of the person injured.

## 4. SAME.

It was the duty of plaintiff, a watchman in defendants' employ at their factory, to open the gate of the yard every morning to admit the workmen. In such yard defendants kept a ferocious Siberian blood-hound, which was usually loosed at night to protect the premises, and chained during the day. Defendants' engineer had charge of the dog, and it was his custom to notify plaintiff when the dog was loose. Plaintiff, while proceeding across the yard in the customary manner to open the gate, and having no knowledge that the dog was loose, was attacked by it and severely injured. *Held*, that plaintiff was not bound to look and see that the dog was fastened before going into the yard, and that he was entitled to recover from defendants for his injuries.

## 5. MASTER AND SERVANT—RISK OF EMPLOYMENT.

A person in the employ of another, charged with specific duties, does not, while in the performance of such duties, assume the risk of injury from a vicious animal kept by the employer, which he is informed will be kept fastened.

Appeal from Supreme Court, General Term, Second Department.

Action by August Muller against John McKesson and others for damages sustained by the bite of a savage and ferocious dog owned and kept by defendants. The jury found a verdict for plaintiff, and judgment was entered thereon, and was affirmed upon appeal to the general term. 10 Hun, 44. From the judgment of the general term defendants appealed.

CHURCH, C. J. The defendants had a chemical factory in Brooklyn, and owned a ferocious dog of the Siberian blood-hound species, which was kept in the inclosed yard surrounding the factory, and generally kept fastened up in the day-time and loosed at night as a protection against thieves. The plaintiff was in the employ of the defendants as a night watchman. It was his duty to open the gate to the yard every morning to admit the workmen, and to do this he would pass from the door of the factory across a corner of the yard to the gate. On the morning in question, as the plaintiff was returning from opening the gate, he was attacked from behind by the dog, thrown to the ground, and severely bitten; and after freeing himself, and while endeavoring to reach the factory, was again attacked, and bitten and seriously injured.

The points urged by the appellants in this case are—First, that the plaintiff was guilty of contributory negligence, or at least that the evidence would have warranted the jury in so finding; second, that the plaintiff knew the vicious habits of the dog, and by voluntarily entering upon and continuing in the employment of the defendants he assumed the risk of such accidents; third, that if the injury was occasioned by the negligence of the engineer in not properly fastening the dog, or in omitting to notify the plaintiff that he was loose, it was the negligence of a co-servant, for which the defendants are not liable.

It may be that, in a certain sense, an action against the owner for an injury by a vicious dog or other animal is based upon negligence; but such negligence consists, not in the manner of keeping or confining the animal, or the care exercised in respect to confining him, but in the fact that he is ferocious, and that the owner knows it, and proof that he is of a savage and ferocious nature is equivalent to express notice. *Earl v. Van Alstine*, 8 Barb. 630. The negligence consists in keeping such an animal. In *May v. Burdett*, 9 Adol. & E. (N. S.) 101, Denman, C. J., said: "But the conclusion to be drawn from an examination of all the authorities appears to us to be this: that a person keeping a mischievous animal, with knowledge of its propensities, is bound to keep it secure, at his peril, and that, if he does mischief, negligence is presumed." When accustomed to bite persons, a dog is a public nuisance, and may be killed by any one when found running at large. *Putnam v. Payne*, 13 Johns. 312; *Brown v. Carpenter*, 26 Vt. 638, 62 Am. Dec. 603. And, when known to the owner, corresponding obligations are imposed upon him. Lord Hale says: "He [the owner] must, at his own peril, keep him safe from doing hurt, for though he use his diligence to keep him up, if he escape and do harm, the owner is liable in damages." In *Kelly v. Tilton*, 2 Abb. Dec. 495, Wright, J., said: "If a person will keep a vicious animal, with knowledge of its propensities, he is bound to keep it secure at his peril." In *Wheeler v. Brant*, 23 Barb. 324,

Judge Balcom said: "Defendant's dog was a nuisance, and so are all vicious dogs, and their owners must either kill them, or confine them as soon as they know their dangerous habits, or answer in damages for their injuries." In *Card v. Case*, 57 E. C. L. 622, Coltman, J., said "that the circumstances of the defendants keeping the animal negligently is not essential; but the gravamen is the keeping the ferocious animal, knowing its propensities." The cases are uniform in this doctrine, although expressed in a variety of language by different judges. *Smith v. Pelah*, 2 Strange, 1264; *Jones v. Perry*, 2 Esp. 482; *Greason v. Keteltas*, 17 N. Y. 496; *Woolf v. Chalker*, 31 Conn. 121, 81 Am. Dec. 175; *Blackman v. Simmons*, 3 Car. & P. 138; *Rider v. White*, 65 N. Y. 54, 22 Am. Rep. 600.

In some of the cases it is said that from the vicious propensity, and knowledge of the owner, negligence will be presumed, and in others that the owner is *prima facie* liable. This language does not mean that the presumption or *prima facie* case may be rebutted by proof of any amount of care on the part of the owner in keeping or restraining the animal, and, unless he can be relieved by some act or omission on the part of the person injured, his liability is absolute. "This presumption of negligence, if it can be said to arise at all, so as to be in any way material in a case where the owner is absolutely bound, at his own peril, to prevent mischief, is a *presumptio juris et de jure*, against which no averment or proof is receivable. It is not a 'presumption,' in the ordinary sense of the word, raising a *prima facie* case which may be rebutted." *Card v. Case*, *supra*, p. 623, note b. It follows that the doctrine of non-liability arising from the negligence of a co-servant in not properly fastening the animal, or in not giving notice of his being loose, cannot be invoked, for the reason that, the negligence of the master being immaterial, that of his servant must be also.

The point as to contributory negligence presents the most difficulty. There are expressions in some of the cases indicating that the liability of the owner is not affected by the negligence of the person injured. In *Smith v. Pelah*, 2 Strange, 1264, the owner was held liable, although the injury happened by reason of the person injured treading on the dog's toes, the chief justice saying: "For it was owing to his not hanging the dog on the first notice." It is not stated that the person injured knew of the dog's propensities or that it was done intentionally. In *Woolf v. Chalker*, 31 Conn. 130, 81 Am. Dec. 175, it is said that the owner is liable, "irrespective of any question of negligence of the plaintiff;" and citing *May v. Burdett* and *Card v. Case*, *supra*.

In *May v. Burdett* the chief justice, after approving of the ruling in *Smith v. Pelah*, 2 Strange, *supra*, and a passage from Hale's Pleas of the Crown, (page 430,) said: "It may be that if the injury was solely occasioned by the willfulness of the plaintiff, after warning,

that may be a ground of defense, but it is unnecessary to give any opinion as to this." It is not intimated, as before stated, in *Smith v. Pelah*, that the treading on the toes of the dog was done intentionally, or with knowledge of his viciousness; and I do not think that it can be claimed from authority, and certainly not from principle, that no act of the person injured would preclude him from recovering, however negligent or willful. The apparent conflict on this point arises, I think, mainly in not making a proper application of the language to the facts of the particular case. If a person, with full knowledge of the evil propensities of an animal, wantonly excites him, or voluntarily and unnecessarily puts himself in the way of such an animal, he would be adjudged to have brought the injury upon himself, and ought not to be entitled to recover. In such a case it cannot be said, in a legal sense, that the keeping of the animal, which is the gravamen of the offense, produced the injury. *Cogswell v. Baldwin*, 15 Vt. 404, 40 Am. Dec. 686; *Koney v. Ward*, 36 How. Prac. 255; *Wheeler v. Brant*, 23 Barb. 324; *Blackman v. Simmons*, 3 Car. & P. 138; *Brock v. Copeland*, 1 Esp. 203; *Bird v. Holbrook*, 4 Bing. 628.

But as the owner is held to a rigorous rule of liability on account of the danger to human life and limb, by harboring and keeping such animals, it follows that he ought not to be relieved from it by slight negligence or want of ordinary care. To enable an owner of such an animal to interpose this defense, acts should be proved, with notice of the character of the animal, which would establish that the person injured voluntarily brought the calamity upon himself. *Brock v. Copeland*, 1 Esp. 203, cited and relied upon by the counsel for the appellant, is in some of its features like this; and, while some of the language of Lord Kenyon is not in harmony with that used in other cases, yet from the facts stated it is fairly inferable that the foreman voluntarily went into the yard at an unusual time, and, so far as appears, without business, knowing that the dog was loose, and knowing his ferocious nature.

The question, then, recurs whether, from the facts appearing in this case, the jury would have been justified in finding that the plaintiff was guilty of that kind of negligence which would relieve the defendants; in other words, could they have found that, in any proper sense, the plaintiff brought the injury upon himself? He was in discharge of his duty, at the proper time and in the right place. He passed from the factory to the gate in the direct path, and was returning when he was attacked by the dog. In *Blackman v. Simmons*, 3 Car. & P. 138, the injury was by a vicious bull, and the court laid stress upon the circumstance that the plaintiff was traveling where he had a right to go, and said: "If the plaintiff had gone where he had no right to go, that might have been an answer to the action." It was not shown that the plaintiff was out of his place; nor, what was more important and indispensable,

was it shown that the plaintiff had notice that the dog was loose, or that he had reason to suppose that he was loose. It was the custom of Godfrey, the engineer, to loose the dog at night and fasten him in the morning, and to notify the plaintiff when the dog was loose. No such notice was given. The plaintiff testifies positively that he did not know or suppose the dog was loose; and from the evidence of Godfrey, called by the defendants, it is inferable that the dog had not been loosed for several days, and, if it had, the plaintiff had a right to suppose that Godfrey had fastened him that morning. It is sufficient to say that the evidence did not show that the plaintiff had notice that the dog was loose, nor were the circumstances such as to induce him to believe that such was the fact. If the negligence of the plaintiff is to prevail, it must be predicated upon not taking the precaution to look, examine, and ascertain whether the dog was fastened or not. The plaintiff might have ascertained by examination whether the dog was fastened in his kennel or not; but I do not think that he was bound to exercise that degree of care, or that the defendant can be relieved from liability because he did not.

It does not appear that such had been his habit, or that his attention had been called to any circumstance to call for unusual precaution. The evidence must have been sufficient to warrant the jury in finding actual notice that the dog was loose, or, at least, that the plaintiff had reason to so believe. This rule is quite as liberal as ought to be adopted in favor of a person who keeps an animal of such savage ferocity as this was found to be. *Ilott v. Wilkes*, 3 Barn. & Ald. 308, and *Bird v. Holbrook*, 4 Bing. 628, were both cases of spring guns. In the former the person injured had notice, and in the latter, though a trespasser, he had not; and the action was held maintainable in the latter, and not in the former. In the former case *Holroyd, J.*, expresses the principle of non-liability, when notice has been given, to be that the act which produced the injury to the plaintiff "must be considered wholly as his act, and not the act of the person who placed the gun there."

As "negligence," in the ordinary sense, is not the ground of liability, so contributory negligence, in its ordinary meaning, is not a defense. These terms are not used in a strictly legal sense in this class of actions, but for convenience. There is considerable reason in favor of the doctrine of absolute liability for injuries produced by a savage dog, whose propensities are known to the owner, on the ground of its being in the interest of humanity, and out of regard to the sanctity of human life; but as these animals have different degrees of ferocity, and the rule must be a general one, I think, in view of all the authorities, that the rule of liability before indicated is a reasonable one, and that the owner cannot be relieved from it by any act of the person injured, unless it be one from which it can

be affirmed that he caused the injury himself, with a full knowledge of its probable consequences.

The evidence in this case falls far short of warranting a verdict that the plaintiff had committed any such act. As before stated, he had no notice that the dog was loose, but had every reason to suppose that he was fastened, and did in fact suppose so. He was in the discharge of his duty, and was not called upon to institute an inquiry whether the dog had broken his fastenings, or that Godfrey had been negligent in not giving him notice that the dog was loose.

The remaining point, that the plaintiff assumed the risk of such accidents, is not tenable. The rule is that a servant assumes the ordinary risks incident to the business in which he engages. What were the risks of his employment here, as it respects the dog? He was informed, it is true, of the nature of the animal, but he was also told that the dog would be kept fastened, and the uniform habit was to notify him when the dog was loose. By the terms of his employment, and the conduct of those who represented the defendants, the most that can be said is that he assumed the risks consequent upon the keeping of a ferocious dog, which was kept fastened except when he was otherwise notified. Beyond this the plaintiff is entitled to the same protection as other persons. This is not a case for relaxing the rule of liability. The dog was of immense size, and a brute as savage as a tiger or a lion, and should be more properly classed with such wild beasts than with the domestic dog, which, although useless, is generally comparatively harmless. He had no respect for persons. In the language of the person who sold him to defendants, "he bit everybody." There is no legal excuse for exposing human life to the ferocity of such an animal. The judgment must be affirmed. All concur, except RAPALLO, J., absent.

Judgment affirmed.

(See also *May v. Burdett*, 9 Q. B. 101; *Filburn v. People's Palace, etc., Co.*, 25 Q. B. Div. 258; *Lynch v. McNally*, 73 N. Y. 347; *Perkins v. Mossman*, 44 N. J. Law, 579; *Spring Co. v. Edgar*, 99 U. S. 645, 25 L. Ed. 487 [injury by stag kept in park at Saratoga by the Congress Spring Company to child walking in the park; Spring Company held liable]; *Godeau v. Blood*, 52 Vt. 251, 36 Am. Rep. 751; *Twigg v. Ryland*, 62 Md. 380, 50 Am. Rep. 226; *Laherty v. Hogan*, 13 Daly, 533; *Woolf v. Chalker*, 31 Conn. 127, 81 Am. Dec. 175.)

## TRESPASS TO PERSONAL PROPERTY.

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### I. WHAT CONSTITUTES A TRESPASS.

(37 Ala. 430.)

WHITE v. BRANTLEY.

(Supreme Court of Alabama. January Term, 1861.)

#### TRESPASS TO PERSONAL PROPERTY—WHEN BAILOR MAY SUE.

An action of trespass lies by the owner of a dog for destroying it, though the dog is not at the time in his actual possession, but loaned to another. In this form of bailment the general property draws to it the possession.

Appeal from Circuit Court, Dallas County.

Action of trespass by White against Brantley for killing plaintiff's dog. Defendant pleaded that the dog, at the time of the alleged killing, was not in plaintiff's possession. Plaintiff replied that the dog was in the possession of a certain third person under a loan from plaintiff. Judgment was given for defendant upon the pleadings, which plaintiff assigned as error.

WALKER, C. J. Dogs are animals *domitæ naturæ*, and although they may not be, in the estimation of the common law, of such value as that the stealing of them amounts to larceny, yet an action at law lies for destroying them. There is no distinction between them and other chattels, as to the possession necessary to the maintenance of an action of trespass. There is a distinction as to animals *feræ naturæ*; but dogs are not animals *feræ naturæ*. 4 Bl. Comm. 236; Ireland v. Higgins, Cro. Eliz. 125; Wright v. Ramscot, 1 Saund. 85; Case of Swans, 7 Coke, 18; Parker v. Mise, 27 Ala. 480, 62 Am. Dec. 776. It follows that, to the maintenance of this action, it was not requisite that the plaintiff should have had actual possession of the dog. If he was the owner of the dog, and the dog was loaned out at the time, the general property, "prima facie, as to all civil purposes, draws to it the possession."

Reversed and remanded.

(In cases of what are called "simple bailment," *i. e.*, where the bailor has a right to restoration of possession whenever he demands it from the bailee, as in cases of depositum, mandatum, commodatum, etc., the bailor is said to have "constructive possession," the bailee "actual possession," and either can maintain trespass against a third person who wrongfully takes the chattel from the bailee, or destroys it. Cooley on Torts [2d Ed.] 512.)

(12 Me. 67, 28 Am. Dec. 159.)

HOBART v. HAGGET (In part.)

(Supreme Judicial Court of Maine. April Term, 1835.)

## TRESPASS TO PERSONAL PROPERTY—INTENT—MISTAKE.

A mistake will not excuse a trespass, nor is the intent material. Where there is a mistake between the seller and purchaser as to the article sold, the seller supposing he has sold one article while the purchaser supposes he has bought another, of which he takes possession, he will be liable in trespass.

## Exceptions from Court of Common Pleas.

Action of trespass for taking and converting an ox, the property of plaintiff. It appeared at the trial that plaintiff sold defendant an ox, and told him to go to his place and take it, and that defendant went and took out of plaintiff's field an ox which he supposed was the one he purchased. Plaintiff claimed and testified that such ox was not the one he intended to sell, or supposed defendant considered himself as buying. The court instructed the jury that if they were satisfied that there had been an innocent mistake between the parties, and that defendant had supposed he had purchased the ox in question when in fact plaintiff supposed he was not selling that ox, but another, they would find for plaintiff, to which defendant excepted. The verdict was for plaintiff for the value of the ox taken. Defendant alleged exceptions.

PARRIS, J. The ox taken by defendant was the property of the plaintiff, and although the defendant attempted to prove that he purchased that ox, and consequently had a right to take it, the attempt wholly failed. He may have considered himself as the purchaser, but, unless the plaintiff assented to it, no property passed. The assent of both minds was necessary to make the contract. The court below charged the jury that if they were satisfied there had been an innocent mistake between the parties, and that the defendant had supposed he had purchased the ox in question when in fact the plaintiff supposed he was not selling that ox, but another, that they would find for the plaintiff. The jury, having found for the plaintiff, have virtually found that he did not sell the ox in controversy, and the question is raised whether the defendant is liable in trespass for having taken it by mistake. It is contended that, where the act complained of is involuntary and without fault, trespass will not lie, and sundry authorities have been referred to in support of that position.

But the act complained of in this case was not involuntary. The taking the plaintiff's ox was the deliberate and voluntary act of the defendant. He might not have intended to commit a trespass in so

doing. Neither does the officer, when on a precept against A he takes by mistake the property of B, intend to commit a trespass; nor does he intend to become a trespasser who, believing that he is cutting timber on his own land, by mistaking the line of division cuts on his neighbor's land; and yet, in both cases, the law would hold them as trespassers. The case of *Higginson v. York*, 5 Mass. 341, was still stronger than either of those above supposed. In that case, one Kenniston hired the defendant to take a cargo of wood from Burntcoat island to Boston. Kenniston went with the defendant to the island, where the latter took the wood on board his vessel, and transported it to Boston, and accounted for it to Kenniston. It turned out on trial that one Phinney had cut this wood on the plaintiff's land without right or authority, and sold it to Kenniston. York, the defendant, was held liable to the plaintiff for the value of the wood in an action of trespass, although it was argued that he was ignorant of the original trespass committed by Phinney. A mistake will not excuse a trespass. Though the injury has proceeded from mistake, the action lies, for there is some fault from the neglect and want of proper care, and it must have been done voluntarily. *Basely v. Clarkson*, 3 Lev. 37. Nor is the intent or design of the wrong-doer the criterion as to the form of remedy, for there are many cases in the books where, the injury being direct and immediate, trespass has been holden to lie, though the injury were not intentional, as in *Guille v. Swan*, 19 Johns. 381, 10 Am. Dec. 234, where the defendant ascended in a balloon, which descended into the plaintiff's garden; and the defendant, being entangled and in a perilous situation, called for help, and a crowd of people broke through the fences into the plaintiff's garden, and beat and trod down his vegetables, the defendant was held answerable in trespass for all the damages done to the garden. In this case *Spencer, C. J.*, said: "The intent with which an act is done is by no means the test of the liability of a party to an action of trespass. If the act cause the immediate injury, whether it was intentional or unintentional, trespass is the proper action to redress the wrong." See, also, 1 Poth. art. 1, § 1; 1 Sum. 219, 307.

The exceptions are overruled, and there must be Judgment on the verdict.

(6 Wis. 320.)

## DEXTER v. COLE.

(Supreme Court of Wisconsin. January Term, 1858.)

## 1. TRESPASS TO PERSONAL PROPERTY—INTENT—MISTAKE.

To maintain trespass *de bonis asportatis*, actual forcible dispossession of property is not necessary; any unlawful interference with or exercise of acts of ownership over property, to the exclusion of the owner, will constitute trespass, though there was no wrongful intent, and the property was taken accidentally or by mistake.

## 2. SAME.

Plaintiff's sheep, running at large in the highway, became mixed with sheep which defendant was driving to market. Defendant separated all but four of them, which he drove to market with his flock. *Held*, that he was liable in trespass.

Error to Circuit Court, Milwaukee County.

Action of trespass by D. H. Dexter against James Cole for taking and driving away 22 sheep, the property of plaintiff. On the trial before a justice of the peace and a jury, it appeared that plaintiff's sheep, running at large in the highway, became mixed with a larger flock which defendant was driving to market; whereupon defendant drove the whole flock into a yard to separate them, and threw out a number which he did not claim, and drove the rest to market and slaughtered them. The evidence tended to show (and it appeared from the verdict that the jury so found) that four of plaintiff's sheep remained in the flock, and were slaughtered with the rest. The judgment for plaintiff was reversed upon certiorari. Plaintiff sued out a writ of error.

COLE, J. We have no doubt but that the action of trespass would lie in this case. In driving off the sheep the defendant in error, without doubt, unlawfully interfered with the property of Dexter; and it has been frequently decided that, to maintain trespass *de bonis asportatis*, it was not necessary to prove actual, forcible dispossession of property; but that evidence of any unlawful interference with, or exercise of acts of ownership over, property, to the exclusion of the owner, would sustain the action. *Gibbs v. Chase*, 10 Mass. 128; *Miller v. Baker*, 1 Metc. (Mass.) 27; *Phillips v. Hall*, 8 Wend. 610, 24 Am. Dec. 108; *Morgan v. Varick*, 8 Wend. 587; *Wintringham v. Lafoy*, 7 Cow. 735; *Reynolds v. Shuler*, 5 Cow. 325; 1 Chitty, Pl. (11th Amer. Ed.) 170, and cases cited in the notes. Neither is it necessary to prove that the act was done with a wrongful intent, it being sufficient if it was without a justifiable cause or purpose, though it were done accidentally or by mistake. 2 Greenl. Ev. § 622; *Guille v. Swan*, 19 Johns. 381, 10 Am. Dec. 234. There is nothing inconsistent with these authorities in the case of *Parker*

v. Walrod, 13 Wend. 296, cited upon the brief of the counsel for the defendant in error.

Upon the other point in the case we think there was some evidence to support the verdict of the jury, and therefore the judgment of the justice should not be reversed because the proof was insufficient. It was the province of the jury to weigh the evidence, and determine what facts were established by it; and the county court ought not to reverse the judgment, because the proof was not sufficient in its opinion to justify the finding of the jury.

The judgment of the county court is therefore reversed, and the judgment of the justice affirmed.

(See also *Ely v. Ehle*, 3 N. Y. 507; *Haythorn v. Rushforth*, 19 N. J. Law, 160, 38 Am. Dec. 540; *Kirk v. Gregory*, 1 Exch. Div. 55; *Fouldes v. Willoughby*, 8 Mees. & W. 540; *Gilman v. Emery*, 54 Me. 460; *Bruch v. Carter*, 32 N. J. Law, 554; *Burgess v. Graffam* [C. C.] 18 Fed. 251; *Welsh v. Bell*, 32 Pa. 12; *Stanley v. Gaylord*, 1 Cush. 536, 48 Am. Dec. 643. Untying and removing a horse from a hitching post where its owner had a right to tie it has been held a trespass. *Bruch v. Carter*, 32 N. J. Law, 554.)

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(12 Wend. 39.)

**WALL et al. v. OSBORN.**

(Supreme Court of New York. May, 1834.)

**TRESPASS—SALE OF ANOTHER'S PROPERTY—REMOVAL.**

Where a party sold a mill standing upon the lot of his neighbor, and appointed a day for the purchaser to take it away, promising to aid him in its removal if assistance was necessary, and the mill was subsequently taken down and removed by the purchaser; it was held that the vendor was liable in an action of trespass, although there was no proof of his being present, or aiding in the removal of the building.

Error from the superior court of the city of New York. The Messrs. Wall sued Osborn in trespass for taking down and carrying off a mill erected upon plaintiffs' lot of land. Osborn was in possession of a lot adjoining that of the plaintiffs, whose mill projected a few inches upon the lot of the defendant. The defendant sold the mill to one Carman, and told him that if he would send his men to take down the mill, at a specified time, he would have a man to assist him if he wanted help. The mill was subsequently taken down by Carman, but whether Osborn was present or furnished any assistance was not clearly shown. The chief justice of the superior court instructed the jury that the sale of the mill to Carman, and the appointment of a time for him to take possession of it, was not such a participation in the act of removal as to make the defendant a trespasser. The jury found for the defendant, and the plaintiffs, having excepted to the charge of the judge, sued out a writ of error.

SAVAGE, C. J. In *Guille v. Swan*, 19 Johns. 382, 10 Am. Dec. 234, Ch. J. Spencer says: "To render one man liable in trespass for the acts of others, it must appear either that they acted in concert, or that the act of the individual sought to be charged ordinarily and naturally produced the acts of the others." In *Scott v. Shepherd*, 2 Black. R. 892, Chief Justice De Grey laid it down as a correct principle that one who does an unlawful act is considered as the doer of all that follows. In the language of Lord Ellenborough, in *Leame v. Bray*, 3 East, 595, he is the *causa causans*—the prime mover of the damage to the plaintiff. By the act of selling the plaintiffs' property the defendant assumed a control over it, and by appointing the time for the removal of the mill he virtually directed the purchaser to take it away. In the case of *Morgan v. Varick*, 8 Wend. 594, the defendant sold the plaintiff's steam engine, and requested the purchaser to take it away; and he was held liable in trespass. The principle has been frequently recognized in this court that any unlawful interference with or assertion of control over the property of another is sufficient to subject the party to an action of trespass or trover. *Phillips v. Hall*, 8 Wend. 613, 24 Am. Dec. 108; *Winteringham v. Lafoy*, 7 Cow. 735; see also *Gibbs v. Chase*, 10 Mass. 125. If the law were otherwise, great injury might ensue without remedy to the aggrieved party. The defendant in this case, by undertaking to sell the plaintiffs' property, was the moving cause of the injury sustained by the plaintiffs. On the supposition that the purchaser is perfectly responsible, the plaintiffs have been put to trouble and expense for which the defendant should be liable. If the law were otherwise, and if in such case a purchaser was irresponsible, the owner might lose his property altogether.

The judgment below must be reversed, with costs; *venire de novo* to issue in this court.

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## II. IS AN INJURY TO THE RIGHT OF POSSESSION.

(13 Me. 236.)

LUNT et al. v. BROWN.

(Supreme Judicial Court of Maine. May Term, 1836.)

### 1. TRESPASS TO PERSONAL PROPERTY—POSSESSION OR RIGHT TO POSSESSION.

A person cannot maintain trespass for taking personal property, unless at the time of the taking he had either actual or constructive possession, or a right to the immediate possession.

### 2. SAME.

Where personal property is left in the possession of another under an agreement for a specified time, the owner cannot maintain trespass against a third person for taking such property during such time.

**Exceptions from Court of Common Pleas.**

Action of trespass by Johnson Lunt and S. Lunt against Royal Brown for taking plaintiffs' mare. Plaintiffs had purchased the mare of one Winn, and had agreed that Winn should keep her "until grazing time;" and while she was in Winn's possession under such agreement she was taken by defendant, a deputy-sheriff, under an execution against Winn. The court instructed the jury that on such facts plaintiffs could not recover, and the verdict was for defendant. Plaintiffs alleged exceptions.

WESTON, C. J. Regarding the right of property in the mare in controversy to have been in the plaintiffs, with a right of pre-emption only in Winn, as whose property she was taken by the defendant, the officer, the case finds that, by the agreement between the plaintiffs and Winn, the latter was to keep her until grazing time. She was taken by the officer in March, before the time of grazing. And this is the only proof of trespass upon which the plaintiffs rely to maintain their action. Trespass is a remedy afforded by law for an injury done to the plaintiffs' possession. They must show possession, actual or constructive, or an immediate right of possession.

In *Ward v. Macauley*, 4 Term R. 480, the plaintiff had let to Lord Montfort a ready furnished house, and the lease contained a schedule of the furniture. Pending the lease, the defendants, sheriffs of Middlesex, seized part of the furniture on execution against Lord Montfort. Trespass was held not to lie against the defendants, because the plaintiff had neither possession nor a right of possession at the time. The same doctrine was recognized in *Putnam v. Wyley*, 8 Johns. 432, 5 Am. Dec. 346, and in *Clark v. Carlton*, 1 N. H. 110.

As the plaintiffs had neither possession nor the right of possession at the time of the alleged trespass, we are satisfied, on this ground, that the judge below was warranted in instructing the jury that the action was not maintained. We accordingly overrule the exceptions taken by the counsel for the plaintiffs. It has become unnecessary, therefore, to consider those taken for the defendant, as, if they are overruled, the plaintiffs cannot prevail.

Judgment for defendant.

(See also *Billingsley v. White*, 59 Pa. 469; *Wheeler v. Lawson*, 103 N. Y. 40, 8 N. E. 360; *Muggridge v. Eveleth*, 9 Metc. [Mass.] 233; *Dufour v. Anderson*, 95 Ind. 302; *Staples v. Smith*, 48 Me. 470.)

## CONVERSION OF PERSONAL PROPERTY.

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### I. WHAT CONSTITUTES CONVERSION.

(68 N. Y. 522, 23 Am. Rep. 184.)

LAVERTY v. SNETHEN (in part).

(Court of Appeals of New York. February 20, 1877.)

#### 1. CONVERSION—DISPOSAL BY AGENT OF PROPERTY OF PRINCIPAL.

Where an agent parts with the property of his principal in a way or for a purpose not authorized, he is liable for a conversion; but if he parts with it in accordance with his authority, although at a less price, or if he misapplies the avails, or takes inadequate for sufficient security, he is not liable for a conversion.

#### 2. SAME.

Plaintiff, holding a promissory note payable to his order, indorsed the same, and delivered it to defendant to negotiate for him, with instructions not to let the note go out of his hands without receiving the money for it; and defendant gave a receipt stating that the note was received for negotiation, and was to be returned the next day, or the avails thereof. Defendant delivered the note to a third person, who promised to negotiate it, and return the proceeds. The latter, after negotiating the note, appropriated the proceeds. *Held*, that the act of defendant was an unlawful interference with the note, and amounted to a conversion thereof.

Appeal from Court of Common Pleas of the City and County of New York, General Term.

Action by William K. Laverty against Worthington G. Snethen for the conversion of a promissory note, the property of plaintiff, made by one Holly, payable to plaintiff's order. The action was brought in the marine court of the city of New York. Plaintiff obtained a verdict, and the judgment entered thereon was affirmed on appeal by the general term of the marine court, and, on a further appeal, by the general term of the court of common pleas. From the judgment of the common pleas, defendant appealed.

CHURCH, C. J. The defendant received a promissory note from the plaintiff, made by a third person, and indorsed by the plaintiff, and gave a receipt therefor, stating that it was received for negotiation, and the note to be returned the next day, or the avails thereof. The plaintiff testified, in substance, that he told the defendant not to let the note go out of his reach without receiving the money. The defendant, after negotiating with one Foote about buying the note, delivered the note to him under the promise that he would get it discounted, and return the money to defendant, and he took away the

note for that purpose. Foote did procure the note to be discounted, but appropriated the avails to his own use.

The court charged that, if the jury believed the evidence of the plaintiff in respect to instructing the defendant not to part with the possession of the note, the act of defendant in delivering the note and allowing Foote to take it away, was a conversion in law, and the plaintiff was entitled to recover. The question as to when an agent is liable in trover for conversion is sometimes difficult. The more usual liability of an agent to the principal is an action of *assumpsit*, or what was formerly termed an action on the case for neglect or misconduct, but there are cases when trover is the proper remedy. Conversion is defined to be an unauthorized assumption and exercise of the right of ownership over goods belonging to another, to the exclusion of the owner's rights. A constructive conversion takes place when a person does such acts in reference to the goods of another as amount in law to appropriation of the property to himself. Every unauthorized taking of personal property, and all intermeddling with it, beyond the extent of the authority conferred, in case a limited authority has been given, with intent so to apply and dispose of it as to alter its condition or interfere with the owner's dominion, is a conversion. *Bouv. Law Dict. tit. "Conversion."* *Savage, C. J., in Spencer v. Blackman, 9 Wend. 167,* defines it concisely as follows: "A conversion seems to consist in any tortious act by which the defendant deprives the plaintiff of his goods." In this case the plaintiff placed the note in the hands of the defendant for a special purpose not only, but with restricted authority (as we must assume from the verdict of the jury) not to part with the possession of the note without receiving the money. The delivery to Foote was unauthorized and wrongful, because contrary to the express directions of the owner. The plaintiff was entitled to the absolute dominion over this property as owner. He had a right to part with so much of that dominion as he pleased. He did part with so much of it as would justify the defendant in delivering it for the money in hand, but not otherwise. The act of permitting the note to go out of his possession and beyond his reach was an act which he had no legal right to do. It was an unlawful interference with the plaintiff's property, which resulted in loss, and that interference and disposition constituted, within the general principles referred to, a conversion; and the authorities, I think, sustain this conclusion by a decided weight of adjudication. A leading case is *Syeds v. Hay, 4 Term R. 260*, where it was held that trover would lie against the master of a vessel who had landed goods of the plaintiff contrary to the plaintiff's orders, though the plaintiff might have had them by sending for them, and paying the wharfage. *Butler, J., said: "If one man who is intrusted with the goods of another put them into the hands of a third person, contrary to orders, it is a conversion."* This case has been repeatedly cited by the courts

of this state as good law, and has never, to my knowledge, been disapproved, although it has been distinguished from another class of cases upon which the defendant relies, and which will be hereafter noticed.

In *Spencer v. Blackman*, 9 Wend. 167, a watch was delivered to the defendant to have its value appraised by a watchmaker. He put it into the possession of a watch-maker, when it was levied upon by virtue of an execution, not against the owner, and it was held to be a conversion. *Savage, C. J.*, said: "The watch was intrusted to him for a special purpose, to ascertain its value. He had no orders or leave to deliver it to Johnson, the watch-maker, nor any other person." So, when one hires a horse to go an agreed distance, and goes beyond that distance, he is liable in trover for a conversion. *Wheelock v. Wheelwright*, 5 Mass. 104. So when a factor in Buffalo was directed to sell wheat at a specified price, on a particular day, or ship it to New York, and did not sell or ship it that day, but sold it the next day at the price named, held that, in legal effect, it was a conversion. *Scott v. Rogers*, 31 N. Y. 676. See, also, *Addison on Torts*, 310, and cases there cited.

The cases most strongly relied upon by the learned counsel for the appellant are *Dufresne v. Hutchinson*, 3 Taunt. 117, and *Sarjeant v. Blunt*, 16 Johns. 74, holding that a broker or agent is not liable in trover for selling property at a price below instructions. The distinction in the two classes of cases, I apprehend, is that in the latter the agent or broker did nothing with the property but what he was authorized to do. He had a right to sell and deliver the property. He disobeyed instructions as to price only, and was liable for misconduct, but not for conversion of the property,—a distinction which, in a practical sense, may seem technical, but is founded probably upon the distinction between an unauthorized interference with the property itself, and the avails or terms of sale. At all events, the distinction is fully recognized and settled by authority. In the last case, *Spencer, J.*, distinguished it from *Syeds v. Hay*, *supra*. He said: "In the case of *Syeds v. Hay*, 4 Term R. 260, the captain disobeyed his orders in delivering the goods. He had no right to touch them for the purpose of delivering them on that wharf."

The defendant had a right to sell the note, and if he had sold it at a less price than that stipulated, he would not have been liable in this action; but he had no right to deliver the note to Foote to take away, any more than he had to pay his own debt with it. Morally there might be a difference, but in law both acts would be a conversion, each consisting in exercising an unauthorized dominion over the plaintiff's property. *Palmer v. Jarman*, 2 Mees. & W. 282, is plainly distinguishable. There, the agent was authorized to get the note discounted, which he did, and appropriated the avails. *Parke, B.*, said: "The defendant did nothing with the bill which he was not

authorized to do." So in *Cairnes v. Bleecker*, 12 Johns. 300, where an agent was authorized to deliver goods on receiving sufficient security, and delivered the goods on inadequate security, it was held that trover would not lie, for the reason that the question of the sufficiency of the security was a matter of judgment. In *McMorris v. Simpson*, 21 Wend. 610, Bronson, J., lays down the general rule that the action of trover "may be maintained when the agent has wrongfully converted the property of his principal to his own use, and the fact of conversion may be made out by showing either a demand and refusal, or that the agent has without necessity sold or otherwise disposed of the property, contrary to his instructions. When an agent wrongfully refuses to surrender the goods of his principal, or wholly departs from his authority in disposing of them, he makes the property his own, and may be treated as a tort-feasor." The result of the authorities is that, if the agent parts with the property in a way or for a purpose not authorized, he is liable for a conversion; but if he parts with it in accordance with his authority, although at less price, or if he misapplies the avails, or takes inadequate for sufficient security, he is not liable for a conversion of the property, but only in an action on the case for misconduct. It follows that there was no error in the charge. The question of good faith is not involved. A wrongful intent is not an essential element of the conversion. It is sufficient if the owner has been deprived of his property by the act of another assuming an unauthorized dominion and control over it. *Boyce v. Brockway*, 31 N. Y. 490.

In a moral sense, the defendant may have acted in good faith, and hence the judgment may operate harshly upon him, but the fact found by the jury renders him liable in this action. The judgment must be affirmed. All concur.

Judgment affirmed.

(Every act of control or dominion over property without the owner's authority, and in disregard of his rights, is, in contemplation of law, a conversion. Trover may be maintained for every species of personal property which is the subject of private ownership, including money, bankbills, notes, and bonds. *State v. Omaha Nat. Bk.* [Neb.] 81 N. W. 319; cf. *Industrial, etc., Trust v. Tod*, 170 N. Y. 233, 245, 63 N. E. 285; *Mayer v. Springer* [Ill.] 61 N. E. 348; *Spooner v. Manchester*, 133 Mass. 270, 43 Am. Rep. 514; *Evans v. Mason*, 64 N. H. 98, 5 Atl. 766; *Ersine v. Savage*, 96 Me. 57, 51 Atl. 242.)

(168 N. Y. 533, 61 N. E. 896, 85 Am. St. Rep. 699.)

WAMSLEY v. ATLAS S. S. CO. (In part).

(Court of Appeals of New York. November 26, 1901.)

**1. CONVERSION—LIABILITY OF CARRIER—NEGLIGENCE.**

Where goods have been intrusted to a common carrier for transportation, and are delivered by him, through mistake, or under a forged order, to the wrong person, such misdelivery constitutes conversion; but it is not conversion if the property is stolen or lost through the negligence of the carrier, and so cannot be delivered to the owner. A refusal of the carrier to deliver the goods on demand does not alter the case, since, not having the goods in his possession, he cannot deliver them.

**2. SAME.**

A box of negatives and prints, belonging to a passenger on a steamship, disappeared from the storeroom of the vessel, and could not be found when the vessel reached its destination and the owner then demanded its delivery to him. It was found some months afterwards in another part of the vessel, but who put it there, whether some servant of the carrier or some passenger, was never discovered. *Held* that, though the carrier might possibly have been liable for negligence, he was not responsible, in an action brought against him for conversion, on the foregoing state of facts merely, and the court's refusal to charge that "he could only be made liable in this action on proof of actual conversion of the box of negatives" was reversible error.

Appeal from Supreme Court, Appellate Division, First Department.

Action by William E. Wamsley against the Atlas Steamship Company, Limited. From a judgment of the appellate division (63 N. Y. Supp. 761) affirming a judgment in favor of plaintiff, defendant appeals. Reversed.

The defendant is the owner of a line of steamships running between South America, the West Indies, and New York. In May, 1895, one S. F. Massey took passage on one of defendant's vessels, named the "Alleghany," at Costa Rica, for New York. He took on board a box of negatives and photographic prints, which were placed in the storeroom of the vessel. Upon arriving in New York this box could not be found. Thereafter Massey assigned to the plaintiff his interest in the negatives and prints, and this action was begun to recover the value thereof. The complaint is for conversion, and alleges that Massey delivered the said box to the defendant, to be returned to him on demand, and "thereafter, at the city of New York, said Massey demanded from the defendant the return to him of said box of negatives and views; but this defendant has refused and neglected to deliver the same, and has wrongfully converted the same to his own use and benefit." Upon the trial it was proved that the defendant endeavored to find the box in question, and that it was not discovered until January, 1896, or about two months after the commencement of this action. It was then tendered to the plaintiff, who refused to receive it. The

box was found in the forepeak of the vessel among a lot of signal rockets. How it came there, does not appear. Other facts are stated in the opinion. The action has been twice tried. Upon the first trial the complaint was dismissed. The judgment entered upon this dismissal was reversed by the appellate division. Upon the second trial the case was submitted to the jury, and a verdict rendered in favor of the plaintiff for \$900. The judgment entered upon that verdict has been unanimously affirmed.

WERNER, J. The action was brought and tried upon the theory that the defendant was liable as for a conversion. The question of defendant's liability as for a conversion must therefore be determined in the light of that relation. The general rule is that a common carrier is not liable in conversion for mere nonfeasance, although he may be liable for negligence. So, on the contrary, he may be held in trover when he is guilty of misfeasance, although the wrong may have been unintentional. The principle is thus stated in *Hawkins v. Hoffman*, 6 Hill, 588, 41 Am. Dec. 768. "Trover will lie when goods have been lost to the owner by the act of the carrier, though there may have been no intentional wrong, as when goods are by mistake or under a forged order delivered to the wrong person. But it will not lie for the mere omission of the carrier, as where the property has been stolen or lost through his negligence, and so cannot be delivered to the owner. Mere nonfeasance does not work a conversion of the property, and, although the owner may have another action, he cannot maintain trover." In that case a trunk was lost, and in referring to the fact the court continued: "A demand and refusal would not alter the case, for, as the trunk was either stolen or lost, the defendant could not deliver it. Demand and refusal are only evidence of a conversion where the defendant was in such a condition that he might have delivered the property if he would." In *Packard v. Getman*, 4 Wend. 615, 21 Am. Dec. 168, the supreme court said: "Trover lies not against a carrier for negligence, as for losing a box, but it does for an actual wrong; nor for goods lost or stolen from a carrier or wharfinger. There must be an injurious conversion; something more than a bare omission. Where a carrier loses goods by accident, trover does not lie; but where he is an actor, and delivers them to a third person, though by mistake, the action lies. It also lies where the defendant refuses to deliver the goods according to contract, he having the possession. But if lost or stolen, so that he cannot deliver them, and his inability does not arise from any act of his own, trover does not lie, though case does." To the same effect is *Briggs v. Railroad Co.*, 28 Barb. 515, where it was held that "a mere delay in the delivery of goods by a common carrier is not a conversion thereof, nor will it entitle the owner to recover the value thereof." Following these cases, and citing with

approval the authorities upon which they are based, this court, in *Magnin v. Dinsmore*, 70 N. Y. 417, 26 Am. Rep. 610, thus stated the law of conversion as applied to common carriers: "A conversion implies a wrongful act; a misdelivery; a wrongful disposition or withholding of property. A mere nondelivery will not constitute a conversion; nor will a refusal to deliver on demand, if the goods have been lost through negligence or have been stolen." The case last cited was brought against the president of an express company to recover the value of certain watches delivered to that company by the plaintiff for transportation to a consignee in Memphis. The question was whether the plaintiff was limited to a recovery as for defendant's negligence by the conditions of the contract of carriage, or whether plaintiff could recover the full value of the goods in conversion. In referring to the decision of this court upon a former appeal in that case, the court said: "This court held that the nondelivery of the goods, with the other proofs in the case, was evidence of negligence to be submitted to the jury, and that the onus was upon the defendants to show that they were lost without the negligence of the carriers or their servants. But an action for a conversion will not be sustained upon such evidence alone."

The facts in this case are practically undisputed. Although the complaint alleges a demand and refusal, and the answer admits the allegation, so far as it relates to the demand made by the plaintiff, the evidence shows that the refusal was merely technical, and not actual. The defendant, believing that the box of negatives had either been lost or stolen, simply expressed its inability to deliver the same. Although the box was subsequently found on board defendant's vessel *Alleghany*, under circumstances which raised the presumption that it had not been removed from the ship, there was no evidence showing the circumstances of its removal from the storeroom in which it had been originally deposited. It may have been stolen by a fellow passenger, or have been removed and misplaced by some one for whose acts the defendant was not responsible in an action for conversion, although liable for negligence.

This brings us to the defendant's request to charge, which raises the serious question in the case. The court was asked to charge the jury, "In such case the defendant can only be made liable in this action upon proof of actual conversion of the box of negatives." The court declined to charge otherwise than it had already charged, and defendant's counsel excepted. Unless the court had the right to instruct the jury, as a matter of law, that the defendant was guilty of conversion, this request should have been charged, if the instruction had not previously been given. A brief reference to the salient facts will suffice to show that the court would not have been authorized to hold, as a matter of law, that the defendant was guilty of conversion. The facts, although substantially undisputed, were such as to

support conflicting inferences. The box of negatives was placed in the storeroom of the vessel by one of the defendant's servants. When the owner disembarked, it could not be found. A camera belonging to him had been surreptitiously taken from his stateroom, and some jugs of water that had been placed in the storeroom with the box of negatives were also missing. The camera was recovered under circumstances indicating that it had been stolen, but the record is silent as to the circumstances of the theft or the identity of the thief. The jugs of water were found the day after the loss was reported to the ship's officers. The box of negatives was not recovered until after the lapse of several months, when it was found in the forepeak of the vessel, among some signal rockets. How it came to be there is a matter of conjecture. Whether it was stolen by the same person who took the camera, or whether it was taken by one of the defendant's employees under the belief that it contained brandy, as indicated by the marks on the box, does not appear. Conceding that the defendant is liable in conversion for the misfeasance of its servants, we must also admit that the evidence does not affirmatively disclose any such misfeasance. As we have seen, the theft or loss of the goods through the mere nonfeasance of the carrier does not render him liable in conversion. The mere fact that the box was actually on board the defendant's ship is not necessarily inconsistent with the view that it may have been stolen or lost. If, for instance, the box had been stolen by one for whose acts the defendant was not responsible, it would be none the less a theft because it had been secreted in some inaccessible part of the vessel, instead of being hidden elsewhere. So, if by mistake the box had been taken by a passenger who, after discovering that it did not belong to him, had placed it where it could not be found, there might be a case of negligence against the defendant, when the facts would not support a charge of conversion. These suggestions sufficiently indicate the necessity, under the evidence herein, of a direct and explicit charge to the jury that the plaintiff could not recover in this action unless he had made proof of actual conversion. Let us now see whether the charge, as it stood prior to this request, had fairly and sufficiently instructed the jury upon this point. The following quotation contains all that was said on that subject: "If the said box was discharged from the ship, and passed by the custom-house inspectors, and thereupon left on the dock at pier 6, subject to Lieut. Massey's risk, and it was thereafter taken on board at Lieut. Massey's request and at his risk, the defendant is entitled to your verdict. But if these matters did not occur,—if the box did not come out of the ship until after it was finally discovered, after repeated search,—it will be for you to say whether the conduct of the defendant or its servants, by which the box became mixed up with a lot of other boxes, containing signals, was, under all the circumstances disclosed, excusable or justifiable, so as not to make

defendant liable for its failure to deliver on demand." It will be seen that this charge not only fails to cover the point made by the request, but it assumes that the defendant or its servants removed this box and mixed it with the signals, and upon that assumption the jury was left to say whether such conduct was "excusable or justifiable." We think it was error for the court to decline to charge the substance of the request above referred to.

The judgment of the court below should be reversed, and a new trial ordered, with costs to abide the event.

(To the same effect is *Price v. Oswego, etc.*, R. Co., 50 N. Y. 213, 10 Am. Rep. 475; *Pacific Express Co. v. Shearer*, 160 Ill. 215, 43 N. E. 816, 37 L. R. A. 177, 52 Am. St. Rep. 324.)

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(45 N. J. Law, 515.)

FROME v. DENNIS.

(Supreme Court of New Jersey. November Term, 1883.)

**1. CONVERSION—WHAT ACTS CONSTITUTE.**

To constitute a conversion, there must be acts amounting to a repudiation of the owner's right in the property, or an exercise of ownership over it inconsistent with such right, or some act done which destroys or changes the quality of the property.

**2. SAME—INTENT—KNOWLEDGE OF OWNERSHIP.**

A person who, having no knowledge of the ownership of property, borrows it of the person having possession thereof, and, after using it, returns it again to him, supposing him to be the owner, is not liable for a conversion, in an action by the true owner.

**3. SAME—DEMAND BY OWNER AND REFUSAL.**

Under such circumstances, the failure of the borrower to deliver the property to the owner, upon demand by him after it has been returned to the lender, is not evidence of a conversion.

Certiorari to Court of Common Pleas, Warren County.

Action of trover by Thomas P. Frome against Andrew J. Dennis for the alleged conversion of a certain plow.

Argued before DIXON and PARKER, JJ.

DIXON, J. In August, 1879, the plaintiff left his plow on the farm of one Cummins, with the latter's consent, until he, the plaintiff, should come and take it away. In April, 1880, the farm passed into the possession of one Hibler, the plow being still there. In June, 1880, the defendant, a neighboring farmer, borrowed the plow of Hibler to plow a field, supposing the plow to be Hibler's, and, having used it, in three or four days returned it to Hibler, still supposing it to be his property. In the summer of 1881 the plaintiff informed the defendant that it was his plow which he had used, and demanded of him pay for the use, and the return of the plow or its value; and,

the defendant not complying, the plaintiff brought an action of trover for the plow. The justice before whom the suit was instituted, and the common pleas on appeal, each gave judgment for the plaintiff for the value of the plow. The judgment of the pleas is now before us on certiorari, and the defendant below contends that the foregoing facts proved on the trial did not justify the judgment.

In this contention we agree with the defendant. In order to maintain an action of trover, it is necessary to prove an act of conversion by the defendant of the plaintiff's property. What will constitute a conversion is, I think, well summed up by Mr. Justice Depue in *Woodside v. Adams*, 40 N. J. Law, 417, in these words: "To constitute a conversion of goods, there must be some repudiation by the defendant of the owner's right, or some exercise of dominion over them by him inconsistent with such right, or some act done which has the effect of destroying or changing the quality of the chattel." This subject has quite recently received considerable discussion in the exchequer chamber and house of lords of England, in *Fowler v. Hollins*, L. R. 7 Q. B. 616, and L. R. 7 H. L. 757. The facts upon which the court finally settled as the basis of decision made the case a plain one of conversion. They were that one Bayley had fraudulently come into possession of 13 bales of cotton belonging to the plaintiff, and had sold and delivered them to the defendant, who bought in good faith, and who then sold and delivered them in good faith to Micholls & Co. Here was clearly an exercise of dominion over the goods by the defendant inconsistent with the plaintiff's right. But in the course of the cause some of the judges thought that, according to the case reserved, the defendant, in the transfer from Bayley to Micholls & Co., dealt only as broker and agent of the latter; and in examining the goods, receiving them from Bayley, and forwarding them to Micholls & Co., acted without any actual intention with regard to, or any consideration of, the property in the goods being in one person more than another; and so the question was raised whether such a possession of the goods and such an asportation amounted, in law, to a conversion. Many of the English cases were commented on at length by Mr. Justice Brett, in both tribunals, and he insisted, with great force and clearness, upon a negative response. Byles, J., and Kelly, C. B., expressly concurred in this opinion, and the other judges in the exchequer chamber seem not to have disagreed with it in point of law, but they rested their conclusion upon a different view of the facts. In the house of lords Mr. Justice Blackburn expressed his opinion that the defendant was liable, because he both entered into a contract with Bayley, and also assisted in changing the custody of the goods, and so knowingly and intentionally assisted in transferring the dominion in the property in the goods to Micholls & Co., that they might dispose of them as their own. This he deemed a conversion by the defendant, no matter whether he acted as broker or not.

In the course of his remarks he lays down the principle that one who deals with goods at the request of the person who has the actual custody of them, in the bona fide belief that the custodier is the true owner, or has the authority of the true owner, should be excused from what he does, if the act is of such a nature as would be excused if done by the authority of the person in possession, if he was a finder of the goods or intrusted with their custody. He concedes, moreover, that this is not the extreme limit of the excuse, and doubts whether it would be a conversion for a miller to grind grain into flour, and return the flour to the person who brought the grain, before he heard of the true owner. Under the definition of Mr. Justice Depue, above quoted, this act of the miller would be a conversion, because it changed the quality of the owner's goods. Mr. Baron Cleasby, while concurring with those who looked upon the defendant as a principal, and therefore guilty, says with reference to this view that he was a broker merely: "How far the intermeddling with the goods themselves by delivering them would" involve a broker in responsibility to the owner "admits of question, and was the subject of much argument at the bar, and might depend upon the extent to which the broker in such case could be regarded as having an independent possession of the goods and delivering them for the purpose of passing the property." Mr. Justice Grove advised the house in favor of the plaintiff, on the ground that the defendant intermeddled with goods which were not his own, and exercised a dominion over them inconsistent with the right of the true owner. Mr. Baron Amphlett concurred with Brett. Lord Chelmsford, Chancellor Cairns, and Lords Hatherley and O'Hagan advised for the plaintiff, in substance, because the defendant had exercised dominion over the plaintiff's property by disposing of it to Micholls & Co.

It is apparent, I think, from a perusal of these judgments, that every judge based his opinion of the defendant's guilt on the question whether he had done any act which amounted to a repudiation of the plaintiff's title, or to an exercise of dominion, i. e., ownership, over the goods. Less than this would constitute a trespass, but not a conversion, so long as the character of the chattels remained unchanged.

In a very late case in Massachusetts, (*Spooner v. Manchester*, 133 Mass. 270, 43 Am. Rep. 514,) a similar view is expressed. Field, J., there says: "Conversion is based upon the idea of an assumption of property or a right of dominion over the thing converted, \* \* \* and it is therefore not every wrongful intermeddling with, or wrongful asportation or wrongful detention of, personal property that amounts to a conversion. Acts which themselves imply an assertion of title or of a right of dominion over personal property, such as a sale, letting, or destruction of it, amount to a conversion, even although the defendant may have honestly mistaken his rights; but acts

which do not, in themselves, imply an assertion of title or of a right of such dominion over such property will not sustain an action of trover, unless done with the intention to deprive the owner of it permanently or temporarily, or unless there has been a demand for the property, and a neglect or refusal to deliver it, which are evidence of a conversion, because they are evidence that the defendant, in withholding it, claims the right to withhold it, which is a claim of a right of dominion over it. \* \* \* Whether an act involving the temporary use, control, or detention of property implies an assertion of a right of dominion over it may well depend upon the circumstances of the case and the intention of the person dealing with the property." To the same effect is *Laverty v. Snethen*, 68 N. Y. 522, 23 Am. Rep. 184.

In the light of these authorities, the conduct of the defendant in the case at bar did not amount to a conversion of the plow. He received it for temporary use only, and without any claim of right or dominion over it, but having a mere license from the possessor, revocable at once by either the possessor or the true owner. He surrendered it to the possessor, from whom he had received it, without any intention of enlarging or changing his title, without any reference to anybody's title, and doubtless would have as readily surrendered to the plaintiff upon his ownership being shown. Neither in the use nor in the surrender by the defendant does there appear any repudiation of the owner's right, or any exercise of dominion inconsistent with such right. His acts may have constituted a trespass, but not a conversion. This being so, his subsequent failure to deliver the plow to the plaintiff on demand was not evidence of a conversion, for the reason that delivery was then impossible to him. He did not refuse to deliver, but could not. *Ross v. Johnson*, 5 Burrows, 2825; *Bank v. Wheeler*, 48 N. Y. 492, 8 Am. Rep. 564; *Magnin v. Dinsmore*, 70 N. Y. 410, 26 Am. Rep. 608.

The plaintiff contends that the evidence on the part of the defendant as to his conversation with Hibler at the time of borrowing the plow was illegal. It was not, however. It being proper to show that the defendant came into possession of the plow, the declarations of himself and of the person from whom he received possession, contemporaneous with the transfer and indicative of its character, were admissible as part of the *res gestæ*. *Luse v. Jones*, 39 N. J. Law, 707; *Hunter v. State*, 40 N. J. Law, 495.

The judgment below should be reversed.

(The mere act of removal of another's goods from one place to another, independent of any claim over them by the one so removing them, is not a conversion, but only a trespass. *American Union Telegraph Co. v. Middleton*, 80 N. Y. 408; *Falke v. Fletcher*, 18 C. B. [N. S.] 403.)

(14 R. I. 39, 51 Am. Rep. 340.)

FREEMAN et al. v. BOLAND.

(Supreme Court of Rhode Island. December 5, 1882.)

## CONVERSION—WHAT ACTS CONSTITUTE—INFANCY.

A person, though an infant, who hires a horse and wagon to drive to a particular place, and drives beyond such place, is liable for a conversion.

Exceptions from Court of Common Pleas.

Action of trover by Freeman & Francis against Frank P. Boland for the alleged conversion of a horse and buggy. Verdict and judgment for plaintiffs. Defendant alleged exceptions.

DURFEE, C. J. The question here is whether an infant or minor who hires a horse and buggy to drive to a particular place, and who, having got them under the hiring, drives beyond the place or in another direction, is liable in trover for the conversion. We think he is. There are cases in which infancy has been held to be a good defense to an action ex delicto, for tort committed under contract or in making it. But that is not this case. The act here complained of was committed, not under the contract, but by abandoning it, the bailment being thus determined. The contract cannot avail if the infant goes beyond the scope of it. The distinction may be subtle, but it is well settled, and has been often applied in support of actions precisely like this. It is true the contract must be generally put in proof to support the action, but this is because the tort, inasmuch as it is committed by departing from the terms of the contract, cannot be shown without showing the contract, and not because the contract is otherwise involved. *Homer v. Thwing*, 3 Pick. 492; *Towne v. Wiley*, 23 Vt. 355, 56 Am. Dec. 85; *Fish v. Ferris*, 5 Duer, 49; *Vasse v. Smith*, 6 Cranch, 226, 3 L. Ed. 207; *Green v. Sperry*, 16 Vt. 390, 42 Am. Dec. 519; *Campbell v. Stakes*, 2 Wend. 137, 19 Am. Dec. 561; Add. Torts, § 1314.

Exceptions overruled.

(See also *Forbes v. Railroad Co.*, 133 Mass. 154; *Spooner v. Manchester*, 133 Mass. 270, 43 Am. Rep. 514; *Pease v. Smith*, 61 N. Y. 477; *Bank v. Wheeler*, 48 N. Y. 492, 8 Am. Rep. 564; *Alexander v. Swaekhamer*, 105 Ind. 81, 4 N. E. 433, 5 N. E. 908, 55 Am. Rep. 180; *Chapman v. Cole*, 12 Gray, 141, 71 Am. Dec. 739; *Hollins v. Fowler*, L. R. 7 H. L. 757; *First Nat. Bank v. Northern R. Co.*, 58 N. H. 203. In *Doolittle v. Shaw* [Iowa] 60 N. W. 621, 26 L. R. A. 366, 54 Am. St. Rep. 562, it is held not to be conversion to drive a horse beyond the point agreed.)

## II. IS AN INJURY TO THE RIGHT OF POSSESSION.

(1 Strange, 505.)

ARMORY v. DELAMIRIE.

(Court of King's Bench. Hilary Term, 1722.)

### 1. CONVERSION—RIGHT TO POSSESSION—FINDER MAY MAINTAIN TROVER.

The finder of an article has such a property therein as will enable him to keep it as against all but the rightful owner, and he may maintain trover for its conversion.

### 2. MASTER AND SERVANT—LIABILITY TO THIRD PERSONS.

The master is liable for a conversion by his apprentice of property taken by the latter in the line of his employment.

### 3. SAME—MEASURE OF DAMAGES.

A chimney sweep, finding a jewel, delivered it to a goldsmith to ascertain what it was, and the latter took out the stones and returned the socket. *Held*, in an action of trover, that unless defendant produced the stones, the strongest presumption was against him, and the measure of damages should be the value of the finest stones which would fit into the socket.

Before PRATT, C. J., at nisi prius.

The plaintiff, being a chimney sweeper's boy, found a jewel, and carried it to the defendant's shop, (who was a goldsmith,) to know what it was, and delivered it into the hands of the apprentice, who, under pretense of weighing it, took out the stones; and, calling to the master to let him know if it came to three half-pence, the master offered the boy the money, who refused to take it, and insisted to have the thing again; whereupon the apprentice delivered him back the socket without the stones. And now in trover against the master these points were ruled:

1. That the finder of a jewel, though he does not by such finding acquire an absolute property or ownership, yet he has such a property as will enable him to keep it against all but the rightful owner, and consequently may maintain trover.

2. That the action well lay against the master, who gives a credit to his apprentice, and is answerable for his neglect.

3. As to the value of the jewel, several of the trade were examined to prove what a jewel of the finest water that would fit the socket would be worth; and the chief justice directed the jury that, unless the defendant did produce the jewel, and show it not to be of the finest water, they should presume the strongest against him, and make the value of the best jewels the measure of their damages, which they accordingly did.

(51 Minn. 294, 53 N. W. 636.)

## ANDERSON v. GOULDBERG et al.

(Supreme Court of Minnesota. November 17, 1892.)

## REPLEVIN — WHEN LIES — SUFFICIENCY OF BARE POSSESSION AS AGAINST STRANGERS.

Bare possession of property, though wrongfully obtained, is sufficient title to enable the party enjoying it to maintain replevin against a mere stranger to the property, who takes it from him.

Appeal from District Court, Isanti County; Lochren, Judge.

Replevin by Sigfrid Anderson against Hans J. Gouldberg and others, partners as Gouldberg & Anderson, to recover certain logs. Verdict for plaintiff. A new trial was denied, and defendants appeal. Affirmed.

MITCHELL, J. It is settled by the verdict of the jury that the logs in controversy were not cut upon the land of the defendants, and consequently that they were entire strangers to the property. For the purposes of this appeal, we must also assume the fact to be (as there was evidence from which the jury might have so found) that the plaintiffs obtained possession of the logs in the first instance by trespassing upon the land of some third party. Therefore the only question is whether bare possession of property, though wrongfully obtained, is sufficient title to enable the party enjoying it to maintain replevin against a mere stranger, who takes it from him. We had supposed that this was settled in the affirmative as long ago, at least, as the early case of *Armory v. Delamirie*, 1 Strange, 504, so often cited on that point. When it is said that to maintain replevin the plaintiff's possession must have been lawful, it means merely that it must have been lawful as against the person who deprived him of it; and possession is good title against all the world except those having a better title. Counsel says that possession only raises a presumption of title, which, however, may be rebutted. Rightly understood, this is correct; but counsel misapplies it. One who takes property from the possession of another can only rebut this presumption by showing a superior title in himself, or in some way connecting himself with one who has. One who has acquired the possession of property, whether by finding, bailment, or by mere tort, has a right to retain that possession as against a mere wrongdoer who is a stranger to the property. Any other rule would lead to an endless series of unlawful seizures and reprisals in every case where property had once passed out of the possession of the rightful owner.

Order affirmed.

(The rule that in actions for trespass or conversion the defendant cannot set up the *jus tertii* in defense, unless he connects himself with such title, is

upheld by *Jeffries v. Railroad Co.*, 5 El. & Bl. 802; *Stonebridge v. Perkins*, 141 N. Y. 1, 5, 35 N. E. 980 [so held as to trespass and trover, but not (by reason of a New York statute) as to replevin]; *Stevens v. Gordon*, 87 Me. 564, 33 Atl. 27; *Shaw v. Kaler*, 106 Mass. 448; *Eureka Iron Works v. Bresnahan*, 66 Mich. 489, 494, 33 N. W. 834. But some cases are to the contrary. *Reynolds v. Fitzpatrick* [Mont.] 72 Pac. 510; *Boyce v. Williams*, 84 N. C. 275, 37 Am. Rep. 618.)

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(7 Term R. 9.)

GORDON v. HARPER (In part).

(Court of King's Bench. November 11, 1796.)

1. CONVERSION—RIGHT TO POSSESSION—WHO MAY MAINTAIN TROVER.

Trover will not lie for the conversion of personal property unless at the time of the conversion the possession or right to the immediate possession was in plaintiff.

2. SAME—LEASED PROPERTY.

The owner of personal property leased to another cannot maintain trover for a conversion pending the demise.

Case Reserved on Verdict Subject to Opinion of Court.

Action of trover by Gordon against Harper for the conversion of household goods taken by Harper as sheriff, and sold under a writ against one Barret in favor of one Broomhead. Barret had sold the goods to plaintiff, who had leased them to one Briscoe, in connection with the house where they were found, and they were taken by defendant from Briscoe's possession before the expiration of his lease. The lease had not expired at the time of the trial. A verdict was found for plaintiff subject to the opinion of the court on the above facts.

ASHURST, J. I have always understood the rule of law to be that, in order to maintain trover, the plaintiff must have a right of property in the thing, and a right of possession, and that, unless both these rights concur, the action will not lie. Now here it is admitted that the tenant had the right of possession during the continuance of his term, and consequently one of the requisites is wanting to the landlord's right of action. It is true that in the present case it is not very probable that the furniture can be of any use to any other than the actual tenant of the premises; but, supposing the things leased had been manufacturing engines, there is no reason why a creditor seizing them under an execution should not avail himself of the beneficial use of them during the term.

GROSE, J. The only question is whether trover will lie where the plaintiff had neither the actual possession of the goods taken at the time nor the right of possession. The common form of pleading in such an action is decisive against him, for he declares that, being

possessed, etc., he lost the goods. He is therefore bound to show either an actual or virtual possession. If he had a right to the possession, it is implied by law. Where goods are delivered to a carrier, the owner has still a right of possession, as against a tort-feasor, and the carrier is no more than his servant. But here it is clear that the plaintiff had no right of possession, and he would be a trespasser if he took the goods from the tenant. Then, by what authority can he recover them from any other person during the term? It is laid down in some of the books (1 Bac. Abr. 45; 5 Bac. Abr. 257; 2 Com. Dig. tit. "Detinue, D") that trover lies where detinue will lie, the former having in modern times been substituted for the old action of detinue. I will not say that it is universally true that the one action may be substituted for the other, because the authorities referred to in support of that proposition do not apply to that extent; but certainly it may be said to be a good criterion. But it is clear in this case that detinue would not lie, because the plaintiff had no right to the possession of the specific goods at the time. And, if not, it is a strong argument to show that trover, which was substituted in lieu of it, cannot be maintained by the present plaintiff. Much stress has been laid on what was said in *Ward v. Macauley*, 4 Term R. 489; but the only question there was whether trespass would lie under these circumstances, and it was not necessary to determine how far trover might be maintained. It appears now very clearly upon examining that point, that trover will not lie in any case, unless the property converted was in the actual or implied rightful possession of the plaintiff. In this case the plaintiff had neither the one nor the other pending the demise, and, when that is determined, perhaps he may have his goods restored to him again in the same state in which they now are, when it will appear that he has not sustained that damage which he now seeks to recover in this action.

Postea to defendant.

(See also *Stowell v. Otis*, 71 N. Y. 36; *Hale v. Omaha Nat. Bk.*, 49 N. Y. 627, 632; *Raymond Syndicate v. Guttentag*, 177 Mass. 562, 59 N. E. 446; *Clark v. Draper*, 19 N. H. 419; *Winship v. Neale*, 10 Gray, 382; *Castor v. McShaffery*, 48 Pa. 437; *Bartlett v. Hoyt*, 29 N. H. 317; *Bowen v. Fenner*, 40 Barb. 383. In such forms of bailment as depositum, mandatum, commodatum, etc., where the bailor is entitled to reclaim the goods from the bailee at any time, either bailor or bailee may sue a third person who wrongfully takes the goods, in trespass or trover. *Marsden v. Cornell*, 62 N. Y. 215, 221; *Green v. Clarke*, 12 N. Y. 343; *Nicholls v. Bastard*, 2 C. M. & R. 659; *Manders v. Williams*, 4 Ex. 339; *Vining v. Baker*, 53 Me. 544; *Chamberlain v. West* [Minn.] 33 N. W. 114.)

## III. CONVERSION BY JOINT OWNER.

(21 Pick. 559.)

WELD v. OLIVER (in part).

(Supreme Judicial Court of Massachusetts. March 25, 1839.)

## CONVERSION BY TENANT IN COMMON.

Where one tenant in common of personal property sells and delivers the entire property as exclusively his own, it amounts to a conversion, for which his co-tenant can maintain trover.

Case reserved upon agreed facts.

Action of trover by William F. Weld against James Oliver for an alleged conversion of 7,870 bushels of salt. The salt was owned in equal undivided shares by plaintiff and one Greene, and was sold to defendant by Greene in payment of shares of corporate stock bought by Greene. Plaintiff, discovering the sale, forbade defendant disposing of the salt, but defendant thereafter sold it as his own in small lots. Plaintiff contended that by the sale by Greene plaintiff and defendant became tenants in common of such salt, and that the sale by defendant of the salt as exclusively his own was a conversion, and the case was stated for the opinion of the court.

DEWEY, J. The principal question in the present case is whether an action of trover will lie by one tenant in common of personal chattels against his co-tenant upon no other evidence of conversion by him than a sale and delivery of the entire property as exclusively his own. I am not aware that this question has been distinctly settled by any adjudication of this court. The case of *Melville v. Brown*, 15 Mass. 82, which has sometimes been supposed to sanction the doctrine that such a sale was a conversion for which trover would lie, was considered by the court as maintainable upon principles peculiar to itself, and of a more limited character; it being a case of an abuse of an authority in law, under an attachment on mesne process, and subsequent sale on execution by a sheriff. The elementary books generally state the rule to be that one tenant in common cannot maintain trover against his co-tenant unless there has been a destruction of the property; and in some of them it is expressly affirmed that a sale by one co-tenant of the entire property will not amount to a conversion. The cases cited to sustain this latter position are very limited, and not of so decisive a character as to put this point at rest. On the contrary, the question may be considered in this commonwealth as an open one, and to be decided upon what may seem to be sound principle.

The authority of the few English cases usually cited as favoring the doctrine that a sale in such cases is not a conversion is certainly much

weakened by the case of *Barton v. Williams*, 5 Barn. & Ald. 395, where it seems to be distinctly stated by two of the learned judges before whom the cause was heard that a sale of the whole property by one of two tenants in common is a conversion. The case, however, presented other questions, and, in the final disposition of it, this point does not seem to have been settled.

Upon recurring to the origin of the doctrine so frequently stated, that one tenant in common cannot maintain trover against his co-tenant unless there has been a destruction by him of the property thus holden in common, I think it will be found to have been originally asserted with reference to the right of one tenant in common to sue his co-tenant, in an action of trover, for the exclusive use and possession of the common property, and the denying to the other any participation in the same; and, when thus applied, it is entirely correct, upon the familiar principle that the possession of one co-tenant is the possession of both, and he who has the present possession cannot be ousted. It is very clear that one tenant in common cannot maintain an action of trover against his co-tenant for the mere act of withholding from him the use of a chattel, the rights of both being such that he who has the possession cannot be guilty of a conversion by retaining it. Nor can one tenant in common object to the mere sale by the other of the interest of the vendor in the common property, and a delivery over of the chattel to the purchaser. Such a right results from the nature of the relation between the parties, and to this inconvenience each must be subject; the mere change of possession, under such circumstances, being no conversion.

But the question arises whether this be not the limit beyond which, if one co-tenant passes, he subjects himself to an action by the other co-tenant for the conversion of his share of the property. The ordinary evidence of conversion is the unlawful taking or detention of goods from the possession of the true owner; but it is equally true that he who undertakes to dispose of my goods as his own property thereby subjects himself to an action of trover. May not the assumption of property in and a sale of my undivided moiety by my co-tenant be equally a conversion by him of the moiety belonging to me, as the sale by a stranger of an article in which I had the entire interest be the conversion of the whole property by the stranger?

The objection to holding a sale by one tenant in common of the interest of his co-tenant to be a conversion, as stated in *Bac. Abr. "Trover,"* is that such a sale only passes the interest of the vendor, and the interest of the other co-tenant still remains in common with the purchaser, and therefore there can be no conversion by the act of sale. But the fact that the original owner is not divested of his legal property by force of the sale is equally true in the ordinary cases of the conversion of the whole property by a stranger; but this is not deemed a bar to an action of trover, if the owner elects that mode of

redress, rather than to reclaim the specific property. To constitute a conversion of the whole property by a stranger requires only an assumption of authority over, and an actual sale of, the property, and it is not necessary that the legal interest should pass by the sale.

We do not perceive any sufficient reason for taking a distinction between the cases of an unlawful sale of a moiety or the entire estate; and it seems to us, in either case, the assuming an authority to sell, and the making the actual sale, of the interest of another, under a claim of title in the vendor, may properly be taken to be a conversion for which an action of trover will lie. We are sustained in this opinion by an early decision of the supreme court of the state of New York in the case of *Wilson v. Reed*, 3 Johns. 175; and the same principle has also been subsequently recognized in the cases of *Hyde v. Stone*, 9 Cow. 230, 18 Am. Dec. 501, and *Gilbert v. Dickerson*, 7 Wend. 449, 22 Am. Dec. 592.

Judgment for plaintiff.

(See also *Dyckman v. Valiente*, 42 N. Y. 549; *Gates v. Bowers*, 169 N. Y. 14, 61 N. E. 993, 88 Am. St. Rep. 530; *Tuttle v. Campbell*, 74 Mich. 652, 42 N. W. 384, 16 Am. St. Rep. 652; *Wheeler v. Wheeler*, 33 Me. 347; *White v. Phelps*, 12 N. H. 382; *Browning v. Cover*, 108 Pa. 595; *Lewis v. Clark*, 59 Vt. 363, 8 Atl. 158; *Davis v. Lottich*, 46 N. Y. 395; *Lobdell v. Stowell*, 51 N. Y. 70.)

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#### IV. DEMAND AND REFUSAL AS EVIDENCE OF CONVERSION.

(92 Ill. 218.)

HOWITT v. ESTELLE (in part).

(Supreme Court of Illinois. June Term, 1879.)

##### CONVERSION—NECESSITY FOR DEMAND AND REFUSAL.

A wrongful taking or a wrongful sale of personal property constitutes an actual conversion, and, when shown, dispenses with a demand; a demand and refusal being necessary as evidence of a conversion only when a party comes into possession lawfully and retains the property.

Writ of Error to the Circuit Court of Clay County; the Hon. James C. Allen, Judge, presiding.

Mr. Chief Justice WALKER delivered the opinion of the Court: Anastasia Estelle brought an action before a justice of the peace against Sarah E. Howitt to recover the value of a sewing machine. On a trial before the justice, plaintiff recovered a judgment, and also on a trial on an appeal to the circuit court.

It is objected that no demand for the machine was proved. None was required, as defendant testified she had sold it. This, then, was

an actual conversion of the property, which rendered a demand unnecessary. A demand and refusal are only evidence of a conversion, and are not required where an actual conversion is proved. Chitty's Pl. vol. 1, p. 177 (6th Am. Ed.). A wrongful taking or a wrongful sale constitutes an actual conversion, and when shown dispenses with a demand. But where a party comes lawfully into possession and retains the property, to put him in the wrong a demand and refusal are necessary.

Perceiving no error in the record for which the judgment should be reversed, it is affirmed.

Judgment affirmed.

(See also as to when a demand is necessary, *Newman v. Jenne*, 47 Me. 520; *Baker v. Lothrop*, 155 Mass. 376, 29 N. E. 643; *Temple Co. v. Penn Life Ins. Co.* [N. J. Sup.] 54 Atl. 295; *Pease v. Smith*, 61 N. Y. 477, 481, reported, ante, p. 121; *Converse v. Sickles*, 146 N. Y. 200, 40 N. E. 777, 48 Am. St. Rep. 790; *Brown v. Cook*, 9 Johns. 361; *Cooley on Torts* [2d Ed.] 530. When the facts establish an actual conversion without a demand, no demand is needed. *Id.*; *State v. Patten*, 49 Me. 383; *Fisk v. Ewen*, 46 N. H. 173; *Gross v. Scheel* [Neb.] 93 N. W. 418.)

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(9 Allen, 171, 85 Am. Dec. 749.)

GILMORE v. NEWTON.

(Supreme Judicial Court of Massachusetts. Norfolk. October Term, 1864.)

CONVERSION—PURCHASE FROM ONE HAVING NO RIGHT TO SELL.

Purchasing a horse in good faith from one who had no right to sell him, and subsequently exercising dominion over him by letting him to another person, will amount to a conversion, and no demand by the owner is necessary before commencing an action therefor.

Tort for the conversion of a horse.

At the trial in the superior court, before Putnam, J., there was evidence tending to show that the plaintiff, being the owner of the horse in question, let him to one Barrows, who subsequently exchanged him with the defendant for another horse, and that the defendant afterwards let him to a person who ran away with him, and neither the person nor the horse has since been heard of. The defendant supposed his title to the horse to be perfect, and no demand was made by the plaintiff before commencing this action.

The jury returned a verdict for the plaintiff, under instructions authorizing them to do so, and the defendant alleged exceptions.

METCALF, J. We cannot sustain these exceptions. The authorities are decisive that the defendant converted to his own use the plaintiff's horse by taking an assignment and possession of him from a person who had no authority to dispose of him, and subsequently exercising dominion over him. *Stanley v. Gaylord*, 1 Cush. 546, 48

Am. Dec. 643, and cases there cited; *Riley v. Boston Water Power Co.*, 11 Cush. 11; *Williams v. Merle*, 11 Wend. 80, 25 Am. Dec. 604; *Riford v. Montgomery*, 7 Vt. 418; *Courtis v. Cane*, 32 Vt. 232, 76 Am. Dec. 174. In *McCombie v. Davies*, 6 East, 540, Lord Ellenborough said: "According to Lord Holt, in *Baldwin v. Cole*, 6 Mod. 212, the very assuming to one's self the property and right of disposing of another man's goods is a conversion; and certainly a man is guilty of a conversion who takes my property by assignment from another, who has no authority to dispose of it."

The defendant admits that although he had no notice that the horse was stolen, yet he acquired no title to him. But he objects to the maintenance of this action, because no demand of a delivery of the horse to the plaintiff was made and refused before the action was commenced. And he cites, among other books, 2 Greenl. Ev. § 642, where it is said that "a mere purchase of goods, in good faith, from one who had no right to sell them, is not a conversion of them against the lawful owner, until his title has been made known and resisted." This position, though not supported by the cases referred to by Mr. Greenleaf, may be sustained by other cases. And not only are there decisions that "a mere purchase" of property, without taking possession of it, is not a conversion of it, but also decisions that a purchase, receiving a pledge, or other bailment, etc., of property from one who had no right to dispose of it, and taking possession thereof, without any further act of dominion over it, does not always constitute a conversion of it. But we need not discuss this class of cases, for no one of them sustains the defendant's objection; for his is a case not only of receiving an assignment and taking possession of the horse, but also of afterwards exercising dominion over him by bailing him to a third person. See *Leonard v. Tidd*, 3 Metc. 6; *Fernald v. Chase*, 37 Me. 292; *Billiter v. Young*, 6 El. & Bl. 41.

Demand and refusal are never necessary as evidence of conversion, except when the other acts of the defendant are not sufficient to prove it; nor are they evidence of it, when, as in this case, it was not in the power of the defendant to deliver the property when demanded. Besides, after property has been converted, a delivery of it to the owner, on demand by him, will not bar or defeat an action for the conversion, but will only mitigate damages. A demand on the defendant for the horse was therefore needless for the plaintiff, and would have been useless to the defendant.

Exceptions overruled.

(It is held in several states that a purchaser in good faith of a chattel from one who has no title to it is liable for conversion, even though he merely retains the chattel in his possession and does not transfer it. *Prime v. Cobb*, 63 Me. 200; *Hyde v. Noble*, 13 N. H. 494, 38 Am. Dec. 508; *Cooper v. Newnan*, 45 N. H. 339; *Stanley v. Gaylord*, 1 Cush. 536, 48 Am. Dec. 643; *Chapman v. Cole*, 12 Gray, 141, 71 Am. Dec. 739; *Bucklin v. Beals*, 38 Vt. 653. Thus, it is said to be settled law in Massachusetts that "when a thief sells chattels,

even to an honest purchaser, the owner may maintain an action for the property without a previous demand." *Heckle v. Lurvey*, 101 Mass. 344, 3 Am. Rep. 366. In New York, however, the bona fide purchaser is not liable, under such circumstances, until after demand and refusal. *Gillet v. Roberts*, 57 N. Y. 28; *Pease v. Smith*, 61 N. Y. 477, 480; *Millsbaugh v. Mitchell*, 8 Barb. 333; *Rawley v. Brown*, 18 Hun, 456; *S. P. Conner v. Comstock*, 17 Ind. 90.)

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(48 N. Y. 492, 8 Am. Rep. 564.)

**SALT SPRINGS NAT. BANK v. WHEELER** (in part).

(Court of Appeals of New York. May Term, 1872.)

**1. CONVERSION—ACCIDENTAL LOSS OR DESTRUCTION OF PROPERTY.**

The accidental loss or destruction of personal property by one lawfully in its possession is not a conversion thereof.

**2. SAME—DEMAND AND REFUSAL.**

Demand and refusal of bills of exchange do not establish a conversion of them where they have previously been accidentally lost or destroyed. The failure to deliver that which is not in being and cannot be delivered furnishes no evidence of an appropriation by the defendant.

Appeal from judgment of the General Term of the Supreme Court in the Fifth Judicial District, affirming a judgment in favor of the plaintiff, entered upon the decision of the court at circuit, upon trial without a jury.

Certain bills of exchange, drawn on defendant and payable to plaintiff, were sent to defendant for acceptance and payment. The judge found, on trial of this action of trover, that the plaintiff demanded the bills of defendant, who refused to deliver them; that the bills were lost or destroyed through the negligence of the defendant, and that the defendant had converted them; and, as a conclusion of law, that the plaintiff was entitled to recover the amount of the bills, with interest from the demand.

**HUNT, C.** The advantage of an action in trover, rather than an action in assumpsit, in the collection of a debt, is apparent. It gives a right to hold to bail during the pendency of the action, and a right of imprisonment upon an execution, in addition to the usual resort to the property of the defendant. To procure this advantage the plaintiffs have passed by their plain and obvious remedy of an action against the defendant for a breach of contract, and have brought an action of trover. The question is whether they can sustain it.

During the autumn of 1865 the defendant being indebted to the firm of Jaycox & Green in the sum of \$1,012.18, that firm drew upon him for the amount in three several bills of exchange, at one month each. These bills were discounted by the plaintiff at about the time of their several dates, and had all matured before the 30th day of December.

On that day one of them had been due two and a half months, the second nearly two months, the last a few days. These drafts were severally transmitted by the plaintiff to the defendant for acceptance and payment, he being engaged in the business of a banker also. Before the 30th of December the defendant failed and made an assignment. On that day the plaintiff's agent demanded of him the drafts in question. He replied that he thought he had returned them to the plaintiff. Upon reflection and examination he stated that he could not find them, and that he might have burned them up in destroying other papers that he considered of no value. It was not pretended by any witness that the defendant asserted any title to the bills or claimed any right to hold or retain them. There was no reason to doubt the accuracy of the defendant's statement. The judge finds that they were lost, mislaid, or destroyed through the negligence of the defendant. He also finds that he "converted the same."

To authorize the action of trover, two things are necessary: (1) Property in the plaintiff with a right of possession; and (2) a conversion by the defendant of the thing to his own use. This conversion consists of the appropriation of the thing to the party's own use and beneficial enjoyment, or in its destruction, or in exercising dominion over it in defiance of the plaintiff's right, or in withholding it under a claim of title. 2 Greenl. Ev. § 642, and cases cited. The destruction referred to as constituting a conversion is an intentional destruction, not an accidental act. Thus, a misdelivery of goods by a bailee is a conversion. *Id.*, and *Deming v. Barclay*, 2 B. & A. 702; *Seyd v. Hay*, 4 T. R. 260. But the accidental loss by the carrier is not. *Ross v. Johns*, 5 Burr. 2825; *Dwight v. Brewster*, 1 Pick. 50, 11 Am. Dec. 133. A wrongful sale is a conversion, but a purchase in good faith is not in the first instance a conversion. The accidental loss or destruction of an article by one lawfully in its possession has never been held to be a conversion. *Bromley v. Coxwell*, 2 B. & P. 438; *Cairns v. Bleecker*, 12 J. R. 300; *Jervis v. Jolliffe*, 6 Id. 9.

In *LaPlace v. Aupoix* (1 Johns. Cas. 407), cited to the contrary, it appeared that the goods had been placed in the defendant's possession, and had been sold by him, contrary to the orders of the owner. Their subsequent loss on the voyage on which they were shipped was held to make no difference. The defendant was guilty of a direct act of conversion, and the action was well brought.

Demand and refusal do not establish a conversion to the defendant's own use, where, as in this case, it appears that at the time of the demand the bills were not in existence. They had been previously and accidentally destroyed. The failure to deliver that which is not in being and cannot be delivered furnishes no evidence of an appropriation by the defendant. *Murray v. Burling* (10 Johns. 172) and *Decker v. Mathews* (12 N. Y. 313) are cases where the party sued had wrongfully transferred the bill, and received and applied the proceeds to his

own use. They furnish no authority upon the case before us, which is one of an accidental loss or destruction of the bill, no money being received upon it. Upon all of the authorities I have been able to consult, my judgment is that there was no evidence of any conversion of these bills. There was never any denial of the plaintiff's property; there was no claim of property in the defendant; there is no evidence of a voluntary or intentional destruction of them.

I am of the opinion that the judgment should be reversed and a new trial ordered, costs to abide the event. All concur.

**Judgment reversed.**

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(69 N. H. 139, 44 Atl. 910.)

**HETT v. BOSTON & M. R. R.**

(Supreme Court of New Hampshire. Rockingham. July 30, 1897.)

**1. TROVER AND CONVERSION—REFUSAL TO DELIVER.**

Refusal to deliver property to the owner on his demand is merely evidence of conversion, and is open to explanation.

**2. SAME—ATTACHMENT.**

The refusal by a railroad company to deliver goods to the owner after they had been attached as the property of another did not constitute a conversion, where the company disclaimed dominion over them by informing him that the goods were not in its possession, but in the custody of the law.

**3. SAME—QUALIFIED REFUSAL.**

If there is a reasonable doubt of the demandant's right to the possession of the property demanded, a refusal to deliver it until a reasonable opportunity is had to ascertain his right is not sufficient evidence of a conversion. Thus, where a station agent had reasonable doubts as to whether a charge for the detention of a car containing plaintiff's goods was lawful, and as to whether the railroad company would insist on payment, his refusal to deliver the goods to the owner until he could communicate with the company and obtain instructions did not constitute a conversion.

Action of trover by Valentine A. Hett against the Boston and Maine Railroad to recover property of plaintiff delivered to defendant for transportation to plaintiff. After the formal surrender of the goods to plaintiff, while the same were still in the car, the goods were attached. Plaintiff was informed of the attachment, and thereafter demanded the property of defendant's agents, who refused to deliver the same except on payment of the charges for freight and an additional charge for detention of the car while under attachment. Plaintiff refused to pay the sum demanded for detention of the car, and the agent refused to deliver the goods until he could learn from the company's headquarters whether the company would insist upon the payment of such charge for detention. This action was thereupon

brought, and on the following day the agent informed plaintiff that the item for detention of the car was to be omitted. Judgment for defendants.

CARPENTER, C. J. "To constitute a conversion, there must be some exercise of dominion over the property in repudiation of, or inconsistent with, the owner's rights." *Evans v. Mason*, 64 N. H. 98, 5 Atl. 766; *Baker v. Beers*, 64 N. H. 102, 6 Atl. 35. A refusal to deliver property to the owner upon his demand is not of itself a conversion. It is evidence tending to show a conversion, but, like other inconclusive acts, is open to explanation. It is a sufficient answer that it is not in the power of the defendant to comply with the demand. *Johnson v. Couillard*, 4 Allen (Mass.) 446. When the plaintiff made the demand upon the defendants at Nashua, the property was not in their possession. By the attachment it passed into the custody of the law. *Verrall v. Robinson*, 2 Crompt. M. & R. 495; *Stiles v. Davis*, 1 Black, 101, 17 L. Ed. 33; *Osgood v. Carver*, 43 Conn. 24, 30; *Fletcher v. Fletcher*, 7 N. H. 452, 28 Am. Dec. 359. It was as effectually out of their possession and beyond their control as it could have been if the sheriff had removed it from the car and carried it away. They could not lawfully prevent the officer from taking it, nor retake it from his possession. *State v. Fifield*, 18 N. H. 34; *State v. Richardson*, 38 N. H. 208, 75 Am. Dec. 173. Instead of asserting, they disclaimed, any dominion over the property, by informing the plaintiff that it was not in their possession, but in the custody of the law.

The refusal of the defendants' station agent at Portsmouth to deliver the goods unless the plaintiff would pay or promise to pay the charge of \$8 for the detention of the car at Nashua presents a different question. It is not necessary to determine whether the plaintiff was liable to the defendants for that charge. It may be assumed that he was not. The agent informed the plaintiff that he had no authority to deliver the property without payment of the \$8, but offered to deliver it on payment of that sum (to be refunded if his employers should find the charge unwarranted or remit it), or upon a promise to pay in case they should not remit it, and, neither of these propositions being accepted, declined to deliver the goods until he could communicate with the defendants and obtain instructions. If there is a reasonable doubt of the demandant's right to the possession of the property, a refusal to deliver it until a reasonable opportunity is had to ascertain his right is not sufficient evidence of a conversion. In such a case the law does not require one to act on the instant, and either comply with or deny the demand at his peril. *Robinson v. Burleigh*, 5 N. H. 225; *Fletcher v. Fletcher*, 7 N. H. 452, 28 Am. Dec. 359; *Sargent v. Gile*, 8 N. H. 325, 331; *Vaughan v. Watt*, 6 Mees. & W. 492; *Hollins v. Fowler*, L. R. 7 H. L. 757, 766. It is

immaterial on what particular point, material to the justice of the demand, the doubt exists. It may arise upon the question of lien by the holder, or the amount of the lien, as well as upon the identity or authority of the person making the demand. Where the facts are undisputed, and the doubt is upon a question of law, a refusal to deliver until the advice of counsel can be obtained may be considered as the result of a reasonable hesitation in a doubtful matter. *Cushing v. Breck*, 10 N. H. 111, 116; *Eastman v. Association*, 65 N. H. 176, 18 Atl. 745, 5 L. R. A. 712, 23 Am. St. Rep. 29. Upon the facts stated, it could not be found that the station agent's doubt whether the charge for the detention of the car was lawful, and whether the defendants would insist upon or waive its payment, was not a reasonable doubt; and his refusal to deliver the property until he could obtain the defendants' instructions was not sufficient evidence of a conversion. The question whether the time required for, or occupied in, procuring the instructions, was reasonable (*Sargent v. Gile*, 8 N. H. 325, 331), does not arise, because the plaintiff brought his action immediately after the demand. Whether the same result might be reached upon the ground that the plaintiff's demand upon the station agent, who he knew had no authority to comply with it, was not a demand upon the defendants (*Pothonier v. Dawson*, Holt, N. P. 383; 3 Starkie, Ev. 1500; *Poll. Torts*, 291; *Storm v. Livingston*, 6 Johns. 44; *Mount v. Derick*, 5 Hill (N. Y.) 455; *Goodwin v. Wertheimer*, 99 N. Y. 149, 1 N. E. 404), is a question not considered. Judgment for the defendants.

BLODGETT, J., did not sit. The others concurred.

(It is a general rule that demand and refusal are not sufficient evidence of a conversion, when it appears that the property was not at the time in the possession of the person on whom the demand was made. *Dearbourn v. Union Nat. Bank*, 58 Me. 273; *Williamson v. Russell*, 39 Conn. 411; *Canning v. Owen*, 22 R. I. 624, 48 Atl. 1033, 84 Am. St. Rep. 858; *Magnin v. Dinsmore*, 70 N. Y. 410, 26 Am. Rep. 608.

That a qualified refusal, if reasonable under the circumstances, will not establish a conversion, see *McEntee v. New Jersey Steamboat Co.*, 45 N. Y. 34, 6 Am. Rep. 28; *Carroll v. Mix*, 51 Barb. 212; *Stahl v. Boston & M. R. Co.*, 71 N. H. 57, 51 Atl. 176; *Singer Mfg. Co. v. King*, 14 R. I. 511; *Flannery v. Brewer*, 66 Mich. 509, 33 N. W. 522; *Butler v. Jones*, 80 Ala. 436, 2 South. 300. But an absolute refusal in such cases will show a conversion. *Wykoff v. Stevenson*, 46 N. J. Law, 326.)

**When title passes in an action of trover.**

(161 Mass. 473, 37 N. E. 760, 25 L. R. A. 42, 42 Am. St. Rep. 424.)

**MILLER v. HYDE** (In part).

(Supreme Judicial Court of Massachusetts. Middlesex June 19, 1894.)

**CONVERSION—TROVER—WHEN TITLE PASSES.**

Although it appears that formerly, when an action of trover was brought and the plaintiff recovered judgment, title to the chattel was transferred to the defendant upon the entry of judgment, it is now the general rule that title remains in the plaintiff until he has received actual satisfaction. Hence, if the judgment against the defendant is not satisfied, the plaintiff, still having title, can maintain replevin for the chattel against any person who has obtained possession of it from the defendant.

**Appeal from Superior Court, Middlesex County.**

Replevin by Louisa A. Miller, administratrix of the estate of Herbert W. Miller, deceased, against E. A. Hyde, for the possession of a horse. Miller in his lifetime bought the horse through his agent, George Bryden, who kept it for Miller until the latter's death in September, 1890. After her appointment as administratrix, in November, 1890, plaintiff made a demand upon Bryden for the horse, but he, claiming a half interest in the animal, refused to deliver it. In March, 1891, Bryden sold the horse as his own property to Joseph C. Davenport and Ada L. Hyde. Afterwards, the horse being in the possession of Davenport and two other persons, the plaintiff sued these three and Bryden to recover damages for the conversion of the animal, and attached it upon mesne process. She recovered judgment against Bryden only, who was worthless and without property. Execution against him was taken out on such judgment by plaintiff and levied on the horse, which, however, after the levy, was taken from the sheriff on a writ of replevin in favor of Davenport. Davenport took possession of the horse, and later entrusted him to defendant Hyde. While in Hyde's possession the horse was replevied in the present action. The judgment against Bryden in favor of plaintiff has not been satisfied. From a judgment for defendant, plaintiff appeals. Judgment set aside, and judgment for plaintiff ordered.

**BARKER, J.** The plaintiff may maintain replevin if she is the owner of the horse, and if she is not estopped from asserting her ownership against the defendant. As administratrix of her husband's estate, she was the owner when she brought trover in Connecticut against Bryden, the bailee who had wrongfully usurped dominion and sold and delivered the horse to Davenport. As the horse was in Connecticut and the action of trover was in the courts of that state, the effect of the suit upon her title would be determined by the law of

the forum. But as the law of Connecticut is not stated as an agreed fact, we must apply our own. Whether a plaintiff's title to the chattel is transferred upon the entry in his favor of judgment in trover has not been decided by this court. Assuming that, in early times, title to the chattel was transferred to the defendant upon the entry of judgment for the plaintiff in trover, at present a different doctrine is generally applied, and it is now commonly held that title is not transferred by the entry of judgment, but remains in the plaintiff until he has received actual satisfaction. See *Atwater v. Tupper*, 45 Conn. 144, 29 Am. Rep. 674; *Turner v. Brock*, 6 Heisk. 50; *Lovejoy v. Murray*, 3 Wall. 1, 18 L. Ed. 129; *Ex parte Drake*, 5 Ch. Div. 866; *Brinsmead v. Harrison*, L. R. 7 C. P. 547; 1 Greenl. Ev. § 533, and note. And the law has been commonly so administered by our own trial courts. We think this doctrine better calculated to do justice, and see no reason why we should not hold it to be law. Whenever the title passes, as there has been no sale or gift and no title by prescription or by possession taken upon abandonment by the true owner, the transfer is made by his inferred election to recognize as an absolute ownership the qualified dominion wrongfully assumed by the defendant. The true owner makes no release in terms and no election in terms to relinquish his title; but the election is inferred by the law, to prevent injustice. Formerly this election was inferred when judgment for the plaintiff was entered, because his damages, measured by the value of the chattel and interest, were then authoritatively assessed, and the judgment brought to his aid the power of the court to enforce its collection out of the wrong-doer's estate or by taking his person; and this was deemed enough to insure actual satisfaction. If so, it was just to infer that when he accepted these rights he elected to relinquish to the wrongdoer the full ownership of the chattel. An election was not inferred when the suit was commenced, although the plaintiff then alleged that the defendant had converted the chattel, and although the writ might contain a *capias*; because, owing to the uncertainties attendant upon the pursuit of remedies by action, it was not just to infer such an election while ultimate satisfaction for the wrong was but problematical. Forms of action are a means of administering justice rather than an end in themselves. When it is seen that the practical result of a form of action is a failure of justice, the courts will make such changes as are necessary to do justice. If the entry of judgment in trover usually gave the judgment creditor but an empty right, it was not just to infer that upon acquiring such a right he relinquished the ownership of the chattel, and the rule that required the inference to be then drawn was properly changed. The ground for inferring such an election was that upon the entry of judgment he acquired an effectual right in lieu of his property, and the doctrine that, without some actual satisfaction, the inference of an election would not be drawn has been shown by experi-

ence to be necessary to the administration of justice, and has been generally acted upon, and the modern rule adopted that the plaintiff's title is not transferred by the entry of judgment, but is transferred by actual satisfaction. Trover is but a tentative attempt to obtain justice for a wrong, and, until pursued so far that it has given actual satisfaction, ought not to bar the plaintiff from asserting his title. The present doctrine is consistent with the general principle stated by Lord Ellenborough in *Drake v. Mitchell*, 3 East, 251, and quoted in *Vanuxem v. Burr*, 151 Mass. 386, 389, 24 N. E. 773, 21 Am. St. Rep. 458, as approved in *Lord v. Bigelow*, 124 Mass. 185, that "a judgment recovered in any form of action is still but a security for the original cause of action until it be made productive in satisfaction to the party."

Judgment set aside, and judgment for plaintiff ordered. FIELD, HOLMES, and KNOWLTON, JJ., dissenting.

(See *Thayer v. Manley*, 73 N. Y. 305, 309.)

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## LIABILITY OF PUBLIC OFFICERS FOR OFFICIAL ACTS.

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### I. JUDICIAL OFFICERS.

(13 Wall. 335, 20 L. Ed. 646.)

BRADLEY v. FISHER.

(Supreme Court of United States. December Term, 1871.)

#### 1. JUDGE—LIABILITY FOR JUDICIAL ACTS.

Judges of courts of superior or general jurisdiction are not liable to civil actions for their judicial acts, even when such acts are in excess of their jurisdiction, and are alleged to have been done maliciously or corruptly; although there is no such exemption where there is clearly no jurisdiction over the subject-matter, and such want of jurisdiction is known to the judge.

#### 2. SAME—STRIKING NAME OF ATTORNEY FROM ROLL.

An order of the criminal court of the District of Columbia, made in 1867, recited that plaintiff, an attorney practicing in the court, threatened the presiding justice, as he was descending from the bench, with personal chastisement for alleged conduct of the judge during the progress of a criminal trial then pending, and directed that plaintiff's name be stricken from the roll of attorneys practicing in the court. *Held*, that the court, being at that time a separate and independent court, having general criminal jurisdiction, possessed the power to make such order; that the matters recited in the order were ample ground for the action of the court in making it; and that, though the court erred in not citing plaintiff

before making such order, to show cause why it should not be made, and to afford him opportunity for explanation or defense or apology, such error, however it might have affected the validity of the act, did not make it any the less a judicial act; nor did it render the judge making the order liable in damages to plaintiff, as though the court had proceeded without having any jurisdiction whatever over its attorneys.

Error to the Supreme Court of the District of Columbia.

Action by Joseph H. Bradley against George P. Fisher for damages alleged to have been sustained by plaintiff "by reason of the willful, malicious, oppressive, and tyrannical acts and conduct" of defendant, as a judge, in making an order of court striking the name of plaintiff from the roll of attorneys. The jury found a verdict for defendant. To review the judgment entered thereon plaintiff brought a writ of error.

FIELD, J. In 1867 the plaintiff was a member of the bar of the supreme court of the District of Columbia, and the defendant was one of the justices of that court. In June of that year the trial of one John H. Suratt for the murder of Abraham Lincoln was commenced in the criminal court of the district, and was continued until the 10th of the following August, when the jury were discharged in consequence of their inability to agree upon a verdict. The defendant held that court, presiding at the trial of Suratt from its commencement to its close, and the plaintiff was one of the attorneys who defended the prisoner. Immediately upon the discharge of the jury, the court, thus held by the defendant, directed an order to be entered on its records striking the name of the plaintiff from the roll of attorneys practicing in that court. The order was accompanied by a recital that on the 2d of July preceding, during the progress of the trial of Suratt, immediately after the court had taken a recess for the day, as the presiding judge was descending from the bench, he had been accosted in a rude and insulting manner by the plaintiff, charging him with having offered the plaintiff a series of insults from the bench from the commencement of the trial; that the judge had then disclaimed any intention of passing any insult whatever, and had assured the plaintiff that he entertained for him no other feelings than those of respect; but that the plaintiff, so far from accepting this explanation or disclaimer, had threatened the judge with personal chastisement. The plaintiff appears to have regarded this order of the criminal court as an order disbaring him from the supreme court of the District; and the whole theory of the present action proceeds upon that hypothesis. The declaration in one count describes the criminal court as one of the branches of the supreme court, and in the other count represents the order of the criminal court as an order removing the plaintiff from the office of an attorney at law in the supreme court of the District; and it is for the supposed removal from that court, and the assumed

damages consequent thereon, that the action is brought. Yet the criminal court of the District was at that time a separate and independent court, and as distinct from the supreme court of the District as the circuit court is distinct from the supreme court of the United States. Its distinct and independent character was urged by the plaintiff, and successfully urged, in this court, as ground for relief against the subsequent action of the supreme court of the District, based upon what had occurred in the criminal court; and, because of its distinct and independent character, this court held that the supreme court of the District possessed no power to punish the plaintiff on account of contemptuous conduct and language before the criminal court or in the presence of its judge. By this decision, which was rendered at the December term of 1868, (*Ex parte Bradley*, 7 Wall. 364, 19 L. Ed. 214,) the groundwork of the present action of the plaintiff is removed. The law which he successfully invoked, and which protected him when he complained of the action of the supreme court of the District, must now equally avail for the protection of the defendant, when it is attempted to give to the criminal court a position and power which were then denied. The order of the criminal court, as it was then constituted, was not an order of the supreme court of the District, nor of one of the branches of that court. It did not, for we know that in law it could not, remove the plaintiff from the office of an attorney of that court, nor affect his right to practice therein.

This point is distinctly raised by the special plea of the defendant, in which he sets up that at the time the order complained of was made, he was regularly and lawfully holding the criminal court of the District, a court of record, having general jurisdiction for the trial of crimes and offenses arising within the District, and that the order complained of was an order of the criminal court, made by him in the lawful exercise and performance of his authority and duty as its presiding justice, for official misconduct of the plaintiff, as one of its attorneys in his presence; and upon this plea the plaintiff joined issue. The court below, therefore, did not err in excluding the order of removal as evidence in the cause, for the obvious reason that it did not establish, nor tend to establish, the removal of the plaintiff by any order of the defendant, or of the court held by him, from the bar of the supreme court of the District. And the refusal of the court below to admit evidence contradicting the recitals in that order could not be the ground of any just exception, when the order itself was not pertinent to any issue presented. Nor is this conclusion affected by the act of congress passed in June, 1870, nearly three years after the order of removal was made, and nearly two years after the present action was commenced, changing the independent character of the criminal court, and declaring that its judgments, decrees, and orders should be deemed the judgments, decrees, and orders of the supreme court of the District. 16 Stat. 160. If the order of removal acquired

from this legislation a wider scope and operation than it possessed when made, the defendant is not responsible for it. The original act was not altered. It was still an order disbarring the plaintiff only from the criminal court, and any other consequences are attributable to the action of congress, and not to any action of the defendant.

But this is not all. The plea, as will be seen from our statement of it, not only sets up that the order of which the plaintiff complains was an order of the criminal court, but that it was made by the defendant in the lawful exercise and performance of his authority and duty as its presiding justice. In other words, it sets up that the order for the entry of which the suit is brought was a judicial act, done by the defendant as the presiding justice of a court of general criminal jurisdiction. If such were the character of the act and the jurisdiction of the court, the defendant cannot be subjected to responsibility for it in a civil action, however erroneous the act may have been, and however injurious in its consequences it may have proved to the plaintiff. For it is a general principle of the highest importance to the proper administration of justice that a judicial officer, in exercising the authority vested in him, shall be free to act upon his own convictions, without apprehension of personal consequences to himself. Liability to answer to every one who might feel himself aggrieved by the action of the judge would be inconsistent with the possession of this freedom, and would destroy that independence without which no judiciary can be either respectable or useful. As observed by a distinguished English judge, it would establish the weakness of judicial authority in a degrading responsibility. (*Justice Mayne, in Taaffe v. Downes*, reported in a note to 3 Moore, P. C. 41.)

The principle, therefore, which exempts judges of courts of superior or general authority from liability in a civil action for acts done by them in the exercise of their judicial functions, obtains in all countries where there is any well-ordered system of jurisprudence. It has been the settled doctrine of the English courts for many centuries, and has never been denied, that we are aware of, in the courts of this country. It has, as Chancellor Kent observes, "a deep root in the common law." *Yates v. Lansing*, 5 Johns. 291.

Nor can this exemption of the judges from civil liability be affected by the motives with which their judicial acts are performed. The purity of their motives cannot in this way be the subject of judicial inquiry. This was adjudged in the *Case of Floyd and Barker*, reported by Coke, in 1608, (12 Coke, 25,) where it was laid down that the judges of the realm could not be drawn in question for any supposed corruption impeaching the verity of their records, except before the king himself; and it was observed that, if they were required to answer otherwise, it would "tend to the scandal and subversion of all justice, and those who are the most sincere would not be free from continual calumniations." The truth of this latter observation is manifest to all

persons having much experience with judicial proceedings in the superior courts. Controversies involving not merely great pecuniary interests, but the liberty and character of the parties, and consequently exciting the deepest feelings, are being constantly determined in those courts, in which there is great conflict in the evidence, and great doubt as to the law which should govern their decision. It is this class of cases which imposes upon the judge the severest labor, and often creates in his mind a painful sense of responsibility. Yet it is precisely in this class of cases that the losing party feels most keenly the decision against him, and most readily accepts anything but the soundness of the decision in explanation of the action of the judge. Just in proportion to the strength of his convictions of the correctness of his own view of the case is he apt to complain of the judgment against him, and from complaints of the judgment to pass to the ascription of improper motives to the judge. When the controversy involves questions affecting large amounts of property, or relates to a matter of general public concern, or touches the interests of numerous parties, the disappointment occasioned by an adverse decision often finds vent in imputations of this character, and from the imperfection of human nature this is hardly a subject of wonder. If civil actions could be maintained in such cases against the judge, because the losing party should see fit to allege in his complaint that the acts of the judge were done with partiality, or maliciously, or corruptly, the protection essential to judicial independence would be entirely swept away. Few persons sufficiently irritated to institute an action against a judge for his judicial acts would hesitate to ascribe any character to the acts which would be essential to the maintenance of the action. If, upon such allegations, a judge could be compelled to answer in a civil action for his judicial acts, not only would his office be degraded and his usefulness destroyed, but he would be subjected for his protection to the necessity of preserving a complete record of all the evidence produced before him in every litigated case, and of the authorities cited and arguments presented, in order that he might be able to show, to the judge before whom he might be summoned by the losing party,—and that judge, perhaps, one of an inferior jurisdiction,—that he had decided as he did with judicial integrity; and the second judge would be subjected to a similar burden, as he, in his turn, might also be held amenable by the losing party.

Some just observations on this head of the late Chief Justice Shaw will be found in *Pratt v. Gardner*, 2 Cush. 68, 48 Am. Dec. 652, and the point here was adjudged in the recent case of *Fray v. Blackburn*, 3 Best & S. 576, by the queen's bench of England. One of the judges of that bench was sued for a judicial act, and on demurrer one of the objections taken to the declaration was that it was bad in not alleging malice. Judgment on the demurrer having passed for the defendant, the plaintiff applied for leave to amend his declaration by introducing

an allegation of malice and corruption; but Mr. Justice Crompton replied: "It is a principle of our law that no action will lie against a judge of one of the superior courts for a judicial act, though it be alleged to have been done maliciously and corruptly; therefore the proposed allegation would not make the declaration good. The public are deeply interested in this rule, which, indeed, exists for their benefit, and was established in order to secure the independence of the judges, and prevent them being harassed by vexatious actions;" and the leave was refused.

In this country the judges of the superior courts of record are only responsible to the people, or the authorities constituted by the people from whom they receive their commissions, for the manner in which they discharge the great trusts of their office. If, in the exercise of the powers with which they are clothed as ministers of justice, they act with partiality, or maliciously, or corruptly, or arbitrarily, or oppressively, they may be called to an account by impeachment, and suspended or removed from office. In some states they may be thus suspended or removed without impeachment, by a vote of the two houses of the legislature.

In the case of *Randall v. Brigham*, 7 Wall. 523, 19 L. Ed. 285, decided by this court at the December term of 1868, we had occasion to consider at some length the liability of judicial officers to answer in a civil action for their judicial acts. In that case the plaintiff had been removed by the defendant, who was one of the justices of the superior court of Massachusetts, from the bar of that state; and the action was brought for such removal, which was alleged in the declaration to have been made without lawful authority, and wantonly, arbitrarily, and oppressively. In considering the questions presented, the court observed that it was a general principle, applicable to all judicial officers, that they were not liable to a civil action for any judicial act done by them within their jurisdiction; that with reference to judges of limited and inferior authority it had been held that they were protected only when they acted within their jurisdiction; that, if this were the case with respect to them, no such limitation existed with respect to judges of superior or general authority; that they were not liable in civil actions for their judicial acts, even when such acts were in excess of their jurisdiction, "unless, perhaps, when the acts in excess of jurisdiction are done maliciously or corruptly." The qualifying words were inserted upon the suggestion that the previous language laid down the doctrine of judicial exemption from liability to civil actions in terms broader than was necessary for the case under consideration, and that if the language remain unqualified it would require an explanation of some apparently conflicting adjudications found in the reports. They were not intended as an expression of opinion that in the cases supposed such liability would exist, but to avoid the expression of a contrary doctrine.

In the present case we have looked into the authorities, and are clear from them, as well as from the principle on which any exemption is maintained, that the qualifying words used were not necessary to a correct statement of the law, and that judges of courts of superior or general jurisdiction are not liable to civil actions for their judicial acts, even when such acts are in excess of their jurisdiction, and are alleged to have been done maliciously or corruptly. A distinction must be here observed between excess of jurisdiction and the clear absence of all jurisdiction over the subject-matter. Where there is clearly no jurisdiction over the subject-matter, any authority exercised is a usurped authority; and for the exercise of such authority, when the want of jurisdiction is known to the judge, no excuse is permissible. But where jurisdiction over the subject-matter is invested by law in the judge, or in the court which he holds, the manner and extent in which the jurisdiction shall be exercised are generally as much questions for his determination as any other questions involved in the case, although upon the correctness of his determination in these particulars the validity of his judgments may depend. Thus if a probate court, invested only with authority over wills and the settlement of estates of deceased persons, should proceed to try parties for public offenses, jurisdiction over the subject of offenses being entirely wanting in the court, and this being necessarily known to its judge, his commission would afford no protection to him in the exercise of the usurped authority. But if, on the other hand, a judge of a criminal court, invested with general criminal jurisdiction over offenses committed within a certain district, should hold a particular act to be a public offense, which is not by the law made an offense, and proceed to the arrest and trial of a party charged with such act, or should sentence a party convicted to a greater punishment than that authorized by the law upon its proper construction, no personal liability to civil action for such acts would attach to the judge, although those acts would be in excess of his jurisdiction, or of the jurisdiction of the court held by him; for these are particulars for his judicial consideration, whenever his general jurisdiction over the subject-matter is invoked. Indeed, some of the most difficult and embarrassing questions which a judicial officer is called upon to consider and determine relate to his jurisdiction, or that of the court held by him, or the manner in which the jurisdiction shall be exercised. And the same principle of exemption from liability which obtains for errors committed in the ordinary prosecution of a suit where there is jurisdiction of both subject and person applies in cases of this kind, and for the same reasons.

The distinction here made between acts done in excess of jurisdiction, and acts where no jurisdiction whatever over the subject-matter exists, was taken by the court of king's bench in *Ackerley v. Parkinson*, 3 Maule & S. 411. In that case an action was brought against

the vicar-general of the bishop of Chester, and his surrogate, who held the consistorial and episcopal court of the bishop, for excommunicating the plaintiff with the greater excommunication for contumacy, in not taking upon himself the administration of an intestate's effects, to whom the plaintiff was next of kin; the citation issued to him being void, and having been so adjudged. The question presented was whether, under these circumstances, the action would lie. The citation being void, the plaintiff had not been legally brought before the court, and the subsequent proceedings were set aside, on appeal, on that ground. Lord Ellenborough observed that it was his opinion that the action was not maintainable if the ecclesiastical court had a general jurisdiction over the subject-matter, although the citation was a nullity, and said that "no authority had been cited to show that the judge would be liable to an action where he has jurisdiction, but has proceeded erroneously, or, as it is termed, *inverso ordine*." Mr. Justice Blanc said there was "a material distinction between a case where a party comes to an erroneous conclusion in a matter over which he has jurisdiction and a case where he acts wholly without jurisdiction;" and held that where the subject-matter was within the jurisdiction of the judge, and the conclusion was erroneous, although the party should by reason of the error be entitled to have the conclusion set aside, and to be restored to his former rights, yet he was not entitled to claim compensation in damages for the injury done by such erroneous conclusion, as if the court had proceeded without any jurisdiction.

The exemption of judges of the superior courts of record from liability to civil suit for their judicial acts existing when there is jurisdiction of the subject-matter, though irregularity and error attended the exercise of the jurisdiction, the exemption cannot be affected by any consideration of the motives with which the acts are done. The allegation of malicious or corrupt motives could always be made, and, if the motives could be inquired into, judges would be subjected to the same vexatious litigation upon such allegations, whether the motives had nor had not any real existence. Against the consequences of their erroneous or irregular action, from whatever motives proceeding, the law has provided for private parties numerous remedies, and to those remedies they must, in such cases, resort. But for malice or corruption in their action, while exercising their judicial functions within the general scope of their jurisdiction, the judges of these courts can only be reached by public prosecution in the form of impeachment, or in such other form as may be specially prescribed.

If, now, we apply the principle thus stated, the question presented in this case is one of easy solution. The criminal court of the District, as a court of general criminal jurisdiction, possessed the power to strike the name of the plaintiff from its rolls as a practicing attorney. This power of removal from the bar is possessed by all courts

which have authority to admit attorneys to practice. It is a power which should only be exercised for the most weighty reasons, such as would render the continuance of the attorney in practice incompatible with a proper respect of the court for itself, or a proper regard for the integrity of the profession; and except where matters occurring in open court, in presence of the judges, constitute the grounds of its action, the power of the court should never be exercised without notice to the offending party of the grounds of complaint against him, and affording him ample opportunity of explanation and defense. This is a rule of natural justice, and is as applicable to cases where a proceeding is taken to reach the right of an attorney to practice his profession as it is when the proceeding is taken to reach his real or personal property; and even where the matters constituting the grounds of complaint have occurred in open court, under the personal observation of the judges, the attorney should ordinarily be heard before the order of removal is made, for those matters may not be inconsistent with the absence of improper motives on his part, or may be susceptible of such explanation as would mitigate their offensive character, or he may be ready to make all proper reparation and apology. Admission as an attorney is not obtained without years of labor and study. The office which the party thus acquires is one of value, and often becomes the source of great honor and emolument to its possessor. To most persons who enter the profession it is the means of support to themselves and their families. To deprive one of an office of this character would often be to decree poverty to himself, and destitution to his family. A removal from the bar should therefore never be decreed where any punishment less severe, such as reprimand, temporary suspension, or fine, would accomplish the end desired. But, on the other hand, the obligation which attorneys impliedly assume, if they do not by express declaration take upon themselves, when they are admitted to the bar, is not merely to be obedient to the constitution and laws, but to maintain at all times the respect due to courts of justice and judicial officers. This obligation is not discharged by merely observing the rules of courteous demeanor in open court, but it includes abstaining out of court from all insulting language and offensive conduct towards the judges personally for their judicial acts. "In matters collateral to official duty," said Chief Justice Gibson in the Case of Austin, 5 Rawle, 204, "the judge is on a level with the members of the bar as he is with his fellow-citizens, his title to distinction and respect resting on no other foundation than his virtues and qualities as a man. But it is nevertheless evident that professional fidelity may be violated by acts which fall without the lines of professional functions, and which may have been performed out of the pale of the court. Such would be the consequences of beating or insulting a judge in the street for a judgment in court. No one would pretend that an attempt to control the delibera-

tion of the bench by the apprehension of violence, and subject the judges to the power of those who are, or ought to be, subordinate to them, is compatible with professional duty, or the judicial independence so indispensable to the administration of justice. And an enormity of the sort, practiced but on a single judge, would be an offense as much against the court, which is bound to protect all its members, as if it had been repeated on the person of each of them, because the consequences to suitors and the public would be the same; and, whatever may be thought in such a case of the power to punish for contempt, there can be no doubt of the existence of a power to strike the offending attorney from the roll."

The order of removal complained of in this case recites that the plaintiff threatened the presiding justice of the criminal court, as he was descending from the bench, with personal chastisement for alleged conduct of the judge during the progress of a criminal trial then pending. The matters thus recited are stated as the grounds for the exercise of the power possessed by the court to strike the name of the plaintiff from the roll of attorneys practicing therein. It is not necessary for us to determine in this case whether, under any circumstances, the verity of this record can be impeached. It is sufficient to observe that it cannot be impeached in this action or in any civil action against the defendant; and, if the matters recited are taken as true, there was ample ground for the action of the court. A greater indignity could hardly be offered to a judge than to threaten him with personal chastisement for his conduct on the trial of a cause. A judge who should pass over in silence an offense of such gravity would soon find himself a subject of pity, rather than of respect.

The criminal court of the District erred in not citing the plaintiff, before making the order striking his name from the roll of its attorneys, to show cause why such order should not be made for the offensive language and conduct stated, and affording him opportunity for explanation, or defense, or apology. But this erroneous manner in which its jurisdiction was exercised, however it may have affected the validity of the act, did not make the act any less a judicial act; nor did it render the defendant liable to answer in damages for it at the suit of the plaintiff, as though the court had proceeded without having any jurisdiction whatever over its attorneys.

We find no error in the rulings of the court below, and its judgment must therefore be affirmed, and it is so ordered.

Judgment affirmed.

DAVIS, J., with whom concurred CLIFFORD, J., (dissenting.) I agree that judicial officers are exempt from responsibility in a civil action for all their judicial acts in respect to matters of controversy within their jurisdiction. I agree, further, that judges of superior or general authority are equally exempt from liability, even when

they have exceeded their jurisdiction, unless the acts complained of were done maliciously or corruptly. But I dissent from the rule laid down by the majority of the court, that a judge is exempt from liability in a case like the present, where it is alleged, not only that his proceeding was in excess of jurisdiction, but that he acted maliciously and corruptly. If he did so, he is, in my opinion, subject to suit the same as a private person would be under like circumstances. I also dissent from the opinion of the majority of the court for the reason that it discusses the merits of the controversy, which, in the state of the record, I do not consider open for examination.

(See, to the same effect, *Lange v. Benedict*, 73 N. Y. 12, 29 Am. Rep. 80 [a valuable decision holding a judge of a superior court not liable for exceeding his jurisdiction]; *Pike v. Megoun*, 44 Mo. 491; *Scott v. Fishplate*, 117 N. C. 265, 23 S. E. 436, 30 L. R. A. 696; *Anderson v. Gorrie* [1895] 1 Q. B. 668. The same rule has been applied to grand jurors [*Turpen v. Booth*, 56 Cal. 65, 38 Am. Rep. 48]; and to the heads of the executive departments of the United States government [*Spalding v. Vilas*, 161 U. S. 483, 16 Sup. Ct. 631, 40 L. Ed. 788].

Inferior magistrates, as justices of the peace, have been held liable in a civil action for exceeding their jurisdiction, knowing the facts which constitute the defect of jurisdiction. *Clarke v. May*, 2 Gray, 410, 61 Am. Dec. 470; *Piper v. Pearson*, 2 Gray, 120, 61 Am. Dec. 438, and cases cited; *Lange v. Benedict*, 73 N. Y. 12, 34, 29 Am. Rep. 80; *White v. Morse*, 139 Mass. 163, 29 N. E. 539. But they are not liable civilly for honest mistakes in judgment in cases within their jurisdiction [*Austin v. Vrooman*, 128 N. Y. 229, 28 N. E. 477, 14 L. R. A. 138]; nor, in some jurisdictions, even if they, having jurisdiction, acted maliciously or in bad faith [*Jones v. Brown*, 54 Iowa, 74, 6 N. W. 140; *Pratt v. Gardner*, 2 Cush. 63, 48 Am. Dec. 652].

See, further, as to the civil liability of judges for their official acts, ante, pp. 227-234.)

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(3 Denio, 117.)

WEAVER v. DEVENDORF et al.

(Supreme Court of New York. May Term, 1846.)

**1. OFFICERS—LIABILITY FOR JUDICIAL ACTS.**

No public officer is responsible in a civil suit for a judicial determination, however erroneous it may be, and however malicious the motive which produced it, if he had jurisdiction of the particular case, and was authorized to determine it.

**2. SAME—ASSESSORS OF TAXES—LIABILITY FOR ERRONEOUS ASSESSMENT.**

Assessors of taxes act judicially in fixing the value of taxable property, where it is not sworn to as authorized by law; and they are not liable to a civil action, by one over whose person and property they had jurisdiction for the purpose of assessment, for failing to make any allowance or deduction on account of an exemption of a certain amount to which he was entitled, or for assessing his property at a higher rate than that of others.

Error to Court of Common Pleas, Herkimer County.

Action on the case by Weaver against Devendorf and others, brought before a justice of the peace. The declaration alleged that defendants, being assessors of the town of Frankfort for a certain year, assessed plaintiff's taxable property at \$1,800, and in so doing refused to allow him the benefit of the exemption to which he was entitled as a minister of the gospel; that they estimated his property at a higher rate than that of other taxable inhabitants of the town, and refused to make a deduction from his personal property for debts owing by him, though he proved to their satisfaction that he owed such debts; by means of which he was taxed and obliged to pay a large amount, etc. In some of the counts defendants' conduct was charged to have been willful and corrupt, and in others careless and negligent. Defendants pleaded the general issue. On trial, the justice rendered judgment for plaintiff, which, on certiorari, was reversed by the common pleas. To review the judgment of the common pleas plaintiff brought a writ of error.

BEARDSLEY, J. Although the plaintiff may have been a minister of the gospel, still his estate, beyond \$1,500 in value, was equally subject to taxation with that of other persons. 1 Rev. St. pp. 387, 388, §§ 1, 4, 5. It is not suggested that his property was short of that amount, so that he was wholly exempt from taxation, and upon the evidence that could not be urged with a show of plausibility. We need not, therefore, inquire what the rule in such a case would be. This plaintiff appears to have been worth some five or six thousand dollars; his real estate in the town where he resided, and in which the question arose, being somewhat more than \$2,000 in value. It was therefore not a case in which the property of the plaintiff was totally exempt from taxation, and over which the defendants had no jurisdiction whatever, but one in which they were authorized and required by law to make an assessment of the property, even if the owner was a minister of the gospel.

The grounds of complaint on the part of the plaintiff, as far as I can collect them from the return, were twofold—First, that no allowance or deduction was made, in assessing his property, on account of his being a minister; and, secondly, that his property was assessed at a higher rate than that of others, so that he was thereby compelled to bear an undue proportion of the public burdens. There is no evidence in the case, if the fact were material, to show that the defendants did not allow the exemption claimed to the extent of \$1,500; and if the plaintiff was a minister, and entitled to that deduction, we cannot presume against the defendants, who were public officers, that they violated their duty in omitting to make the proper allowance. The presumption is that public officers do their duty, and upon this return it is rather to be inferred that the deduction of

\$1,500 was made. The plaintiff was assessed to the amount of \$1,800 for real and personal property, and which may have been the residue after deducting \$1,500, a conclusion very well warranted by the evidence. But, in my view of the case, it is not at all material whether the \$1,500 were or were not deducted by the defendants, or whether the plaintiff's property was assessed at a higher rate than that of others, for in neither event can this action be sustained.

The defendants were assessors of Frankfort, where the plaintiff resided, and as such had jurisdiction over all taxable inhabitants of that town. His real estate in the town exceeded \$1,500 in value. It was therefore plainly a case in which the defendants had jurisdiction over the property, as well as the person, of the plaintiff; and it was their imperative duty to ascertain, as far as practicable, the taxable property of the plaintiff, and estimate its true value according to their best information, belief, and judgment. 1 Rev. St. pp. 389, 390, tit. 2, arts. 1, 2. In some particulars the duty of assessors is undoubtedly ministerial; but, in fixing the value of taxable property, the power exercised is in its nature purely judicial. With the exception of real and personal estate, the value of which is sworn to as authorized by law, (Id. pp. 392, 393, §§ 15, 16, 22,) the residue is to be valued, estimated, and determined by the assessors. Id. pp. 393, 394, §§ 17, 26. This is emphatically a judicial act. The writ of certiorari, at common law, lies only to officers exercising judicial powers, and to remove proceedings of that character. *People v. Mayor*, etc., 2 Hill, 9, 11; *In re Mount Morris Square*, etc., Id. 14, 21, 22. Yet all the authorities agree that this writ lies to remove an assessment, although, as the allowance of the writ is discretionary, the court, on grounds of public policy and convenience, will ordinarily refuse the writ in cases of this nature. *People v. Supervisors*, 15 Wend. 198; *People v. Supervisors*, 1 Hill, 195; 2 Hill, *supra*. The act complained of in this case was therefore a judicial determination. The assessors were judges acting clearly within the scope and limit of their authority. They were not volunteers, but the duty was imperative and compulsory; and, acting as they did, in the performance of a public duty, in its nature judicial, they were not liable to an action, however erroneous or wrongful their determination may have been. This case might be disposed of on narrow ground, for there was no evidence to justify the conclusion that the defendants acted maliciously in fixing the value of the property of the plaintiff, or of any one else; and, surely, it will not be pretended they were liable for mere error of judgment. But I prefer to place the decision on the broad ground that no public officer is responsible in a civil suit, for a judicial determination, however erroneous it may be, and however malicious the motive which produced it. Such acts, when corrupt, may be punished criminally; but the law will not allow malice and corruption to be charged in a civil suit against such an officer for what he does in the

performance of a judicial duty. The rule extends to judges, from the highest to the lowest, to jurors, and to all public officers, whatever name they may bear in the exercise of judicial power. It of course applies only where the judge or officer had jurisdiction of the particular case, and was authorized to determine it. If he transcends the limits of his authority, he necessarily ceases, in the particular case, to act as a judge, and is responsible for all consequences. But with these limitations the principle of irresponsibility, so far as respects a civil remedy, is as old as the common law itself. The authorities on this subject are almost innumerable. I shall not attempt to state any of them in detail, but will content myself by referring generally to some of the elementary works and adjudged cases, which will be found fully to sustain the principles I have stated: *Brown, Act. Law*, 191-200; 1 *Chit. Pl.* (7th Am. Ed.) 89, 209, 210; 2 *Saund. Pl. & Ev.* 613; 2 *Starkie, Ev.* (7th Am. Ed.) 586, 588, 1111, 1112; *Broom, Leg. Max.* 40, 48; *Yates v. Lansing*, 5 *Johns.* 282, affirmed in error, 9 *Johns.* 396, 6 *Am. Dec.* 290; *Cunningham v. Bucklin*, 8 *Cow.* 178, 18 *Am. Dec.* 432; *Easton v. Calendar*, 11 *Wend.* 90; *Wilson v. Mayor, etc.*, 1 *Denio*, 598, 43 *Am. Dec.* 719; *Stowball v. Ansell*, *Comb.* 116; *Garnett v. Ferrand*, 6 *Barn. & C.* 611; opinion of North, C. J., in *Barnardiston v. Soame*, in the exchequer chamber, 6 *State Tr.* 1063, and in 1 *East*, 568, note; opinion of Burrough, J., in *Duke of Newcastle v. Clark*, 8 *Taunt.* 602; *Case of Floyd & Barker*, 12 *Coke*, 23; *Evans v. Foster*, 1 *N. H.* 377; *Dicas v. Lord Brougham*, 6 *Car. & P.* 249; *Gwinne v. Poole*, 2 *Lutw.* 387; *Brittain v. Kinnaird*, 1 *Brod. & B.* 432; *Bigelow v. Stearns*, 19 *Johns.* 39, 10 *Am. Dec.* 189; *Doswell v. Impey*, 1 *Barn. & C.* 163.

The judgment of the common pleas should be affirmed.

Judgment affirmed.

(In *East River Gaslight Co. v. Donnelly*, 93 *N. Y.* 557, it is said that "no public officer is responsible in a civil suit for a judicial determination, however erroneous or wrong it may be, or however malicious even the motive which produced it. The principle upon which the rule rests was applied in the case of *Weaver v. Devendorf*, 3 *Denio*, 117, and sustained by a great array of authorities." See also *Steele v. Dunham*, 26 *Wis.* 393. In some states, however, election judges are liable civilly, if, in determining a man's right to vote, they act maliciously and corruptly. *Friend v. Hamill*, 34 *Md.* 298; *Cooley on Torts* [2d Ed.] 484, 485.

Tax assessors and other quasi judicial officers are liable if they act without jurisdiction, and they cannot acquire jurisdiction by deciding that they have it. *Dorn v. Backer*, 61 *N. Y.* 267, note; *Williams v. Weaver*, 75 *N. Y.* 30. See 1 *Dillon on Mun. Corp.* [4th Ed.] § 238.)

## II. MINISTERIAL OFFICERS.

(46 N. Y. 194.)

McCARTHY et al. v. CITY OF SYRACUSE.

(Court of Appeals of New York. September 15, 1871.)

## 1. MUNICIPAL CORPORATIONS—CONSTRUCTION AND REPAIR OF SEWERS.

When the duty is imposed by law on the mayor and common council of a city to make and repair sewers in the city, an entire omission to construct a sewer, or a failure to make it of sufficient size, creates no liability on the part of the city, as the duty of determining where sewers shall be located and their dimensions is, in its nature, judicial; but where a sewer has been determined upon, and is constructed, the duties of constructing it properly, and keeping it in good condition and repair, are ministerial, and negligence in the performance of these duties will render the city liable for damages resulting therefrom.

## 2. SAME—NOTICE OF DEFECT.

The duty of the city to keep its sewers in repair involves the exercise of a reasonable degree of watchfulness in ascertaining their condition from time to time, and preventing them from becoming dilapidated or obstructed; and omitting to make the examination necessary to guard against an obstruction or dilapidation of the sewer, which is an ordinary result of its use and might have been discovered on inspection, is a neglect of duty which renders the city liable for damages thereby caused, although none of its officials had notice that the sewer was obstructed or out of repair.

Appeal from Supreme Court, General Term, Fifth Judicial District.

Action by Dennis McCarthy and others against the city of Syracuse for damages to plaintiffs' goods in a basement room of their store in said city. The basement extended under the sidewalks of the streets on which the store was situated, and was flooded with water from a sewer in said streets, constructed by the city, and plaintiffs' goods were injured thereby. Upon trial before a referee, he found in favor of plaintiffs, and judgment was entered on his report, and affirmed by the general term on appeal. Defendant appealed from the judgment of the general term.

RAPALLO, J. The principle appears to be settled in this state that, where a duty of a ministerial character is imposed by law upon a public officer or corporation, a negligent omission to perform that duty creates a liability on the part of such officer or corporation for the damages which individuals may sustain by reason of such omission, and that such liability may be enforced in a civil action by the party injured. *Adsit v. Brady*, 4 Hill, 630, 40 Am. Dec. 305; *Robinson v. Chamberlain*, 34 N. Y. 389, 90 Am. Dec. 713; *Hutson v. Mayor*, etc., 9 N. Y. 169, 59 Am. Dec. 526; *Insurance Co. v. Baldwin*, 37 N.

Y. 648; *Hover v. Barkhoof*, 44 N. Y. 113; *Barton v. City of Syracuse*, 36 N. Y. 54.

The charter of the city of Syracuse, which was in evidence on the trial of this action, contains provisions making it the duty of the mayor and common council to make, open, regulate, repair, and improve sewers in said city; and it is found by the referee that, at the time of the injury, they employed a superintendent and deputies to take care of the streets and sewers, and keep them in repair. It was decided in the case of *Barton v. The City of Syracuse*, 36 N. Y. 54, that, if the city entered upon the performance of this duty, negligence in its performance created a liability to the party injured, and the city was in that case held liable for damages sustained by a party whose property was injured by the overflow of a sewer, caused by an accumulation of mud and filth.

The entire omission to construct a sewer, or the failure to make it of sufficient size, has been held not to create a liability on the part of the city, for the reason that the duty of determining where sewers shall be located, and their dimensions, is in its nature judicial. *Mills v. City of Brooklyn*, 32 N. Y. 489. But where a sewer has been determined upon, and is constructed, all the authorities agree that the duties of constructing it properly, and keeping it in good condition and repair, are ministerial; and that negligence in the performance of those duties will render the city liable for damages resulting therefrom. *Mills v. City of Brooklyn*, 32 N. Y. 489; *Wilson v. Mayor, etc.*, 1 Denio, 595, 43 Am. Dec. 719; *Barton v. City of Syracuse*, 36 N. Y. 54.

The referee has found as facts that the plaintiffs' premises were flooded, and their goods damaged, in consequence of the inability of the sewer in question to carry off the water which fell in the street during a heavy rain, and that this inability of the sewer resulted from its having become obstructed by the falling down of a portion of the bricks of which the inlet was constructed, and the accumulation upon such fallen bricks of mud and street filth, almost entirely closing the inlet; and that the defendant was guilty of a neglect of duty in permitting the sewer to become obstructed and out of repair; and that, by reason of such negligence, the plaintiffs sustained the damages for which the judgment was rendered. This finding of a neglect of duty on the part of the city officials is essential to the plaintiffs' case. Although the duty, under a city charter, of keeping sewers and other constructions in repair, may in one sense be regarded as founded upon a contract, implied from the acceptance of the benefits of the charter, to perform the duties imposed by the same instrument, yet the obligation has not, in any of the cases, been extended beyond that of exercising due diligence. No case has gone so far as to hold that there is an absolute undertaking or guaranty, on the part of the corporation, that these constructions shall at all times, and under

all circumstances, be in proper condition, or to hold the city responsible without some wrongful act or negligent omission on its part. The appellant contends that the uncontroverted facts establish that in this case there was no such negligence, and they rely mainly upon the fact found by the referee, that none of the officials of the city had notice that the sewer was obstructed or out of repair. The mere absence of this notice does not necessarily absolve the city from the charge of negligence. Its duty to keep its sewers in repair is not performed by waiting to be notified by citizens that they are out of repair, and repairing them only when the attention of the officials is called to the damage they have occasioned by having become dilapidated or obstructed; but it involves the exercise of a reasonable degree of watchfulness in ascertaining their condition from time to time, and preventing them from becoming dilapidated or obstructed. When the obstruction or dilapidation is an ordinary result of the use of the sewer, which ought to be anticipated, and could be guarded against by occasional examination and cleansing, the omission to make such examinations, to keep the sewers clear, is a neglect of duty which renders the city liable. *Barton v. City of Syracuse*, 37 Barb. 292; affirmed, 36 N. Y. 54.

But it is further claimed in this case by the appellant that the obstruction was caused by the falling in of the bricks of which the inlet was built, and that these bricks must have fallen in during the extraordinarily heavy rain which resulted in the damage in question, or during a shower which occurred a few hours previously and on the same day. The referee has not found, nor does the evidence disclose with certainty, when this falling in occurred. It is argued, from the fact that during the first shower no water came into the plaintiffs' premises, that the sewer was then in good order. But that is not a necessary sequence. The sewer may have been then partially obstructed, but still have had sufficient capacity to carry off the water which fell at that time, or enough of it to protect the plaintiffs' premises. The street had been flooded in previous rains without injury to the plaintiffs. Neither was it shown that this falling in of the bricks was not caused by some negligence in the construction of the sewer. If the appellants had shown that the sewer was constructed in a workmanlike manner, and that care had been exercised to keep it in proper order, and that, notwithstanding this care, it had caved in, then their want of notice of the injury in season to repair it would have excused them, and this court would be justified in reversing the finding of negligence. But nothing was shown as to the mode of construction of the sewer, nor was it proved that any examination of it had ever been made since it was built. How long it had been falling into the condition in which it was finally found, or from what cause it became so dilapidated, are left to conjecture. The referee has found that the obstruction might have been discovered on inspection, and

that the city was negligent in permitting the sewer to become obstructed and out of repair; and, although it may be that the evidence would have justified a different conclusion, we do not think the case sufficiently clear to authorize us to reverse the finding of the referee, on the ground that there is no evidence to sustain it.

The excavation by the plaintiffs was not unlawful. They owned to the center of the street, subject to the right of way of the public over the surface. For any interference with this right of way the plaintiffs would have been responsible. But, so long as they did no injury to the street, they were at liberty to use the space under it, as they might any other part of their property. They were not bound to leave the earth there, as a protection against a possible overflow of the sewer. The question whether the damage was caused by the stoppage of the sewer was one of fact. There was evidence from which that inference could be drawn, and we cannot review the conclusion of the referee in that respect. The judgment should be affirmed, with costs.

CHURCH, C. J., and ALLEN and PECKHAM, JJ., concurred. GROVER and FOLGER, JJ., dissented. ANDREWS, J., did not vote.

Judgment affirmed.

(See, further, as to the distinction between the judicial and ministerial powers of municipal corporations, *Hardy v. City of Brooklyn*, 90 N. Y. 435, 43 Am. Rep. 182; *Urquhart v. City of Ogdensburg*, 91 N. Y. 67, 43 Am. Rep. 655; 2 *Dillon on Mun. Corp.* [4th Ed.] §§ 1046-1051, where a large number of authorities is collected.

This distinction in regard to officers is well set forth in *People v. Bartels*, 138 Ill. 322, 27 N. E. 1091, as follows: "A judicial officer will not be held liable for an act done by him in the exercise of his judicial functions, if the act is within the scope of his jurisdiction. Official action is judicial where it is the result of judgment or discretion. When the officer has authority to hear and determine the rights of person or property, or the propriety of doing an act, he is vested with judicial power. \* \* \* But where the duty imposed on an officer is purely ministerial, he will be held liable for an injury to another which results from his failure to perform it, or from his performance of it in a negligent or unskillful manner. \* \* \* Official action is ministerial when it is the result of performing a certain and specific duty arising from fixed and definite facts. The same officer may be charged with the performance of both judicial and ministerial duties, and when he is in the exercise of his ministerial functions only, he is, of course, not protected by the judicial privilege." Another good statement of the distinction is in *People v. Commissioners*, 149 N. Y. 26, 43 N. E. 418. See also *Raynsford v. Phelps*, 43 Mich. 342, 5 N. W. 403, 38 Am. Rep. 189; *Amy v. Supervisors*, 11 Wall. 136, 20 L. Ed. 101; *Grider v. Tally*, 77 Ala. 422, 54 Am. Rep. 65.)

(110 Mass. 474, 14 Am. Rep. 613.)

KEENAN v. SOUTHWORTH.

(Supreme Judicial Court of Massachusetts. October Term, 1872.)

POSTMASTER—NEGLIGENCE OF CLERK.

A postmaster is not liable for the loss of a letter occasioned by the negligence or wrongful conduct of his clerk, appointed and sworn as required by law, although selected by him and subject to his orders.

Case reserved from Superior Court.

Action of tort by James H. Keenan against John T. Southworth, postmaster of East Randolph, for damages for the loss of a letter addressed to plaintiff. At the trial evidence was given for plaintiff tending to show that the letter was received at the post-office at East Randolph, and was lost by the negligence or wrongful conduct of one Bird, who was the postmaster's clerk. Plaintiff disclaimed "any actual participancy or knowledge of the acts of Bird on the part of the defendant." The judge ruled that defendant was not liable for any careless, negligent, or wrongful acts of Bird; and, by consent of plaintiff, he directed a verdict for defendant, and reported the case for the consideration of the court; if the ruling was wrong, the verdict to be set aside, and the case to stand for trial; otherwise, judgment for defendant on the verdict.

GRAY, J. The law is well settled in England and America that the postmaster general, the deputy-postmasters, and their assistants and clerks, appointed and sworn as required by law, are public officers, each of whom is responsible for his own negligence only, and not for that of any of the others, although selected by him, and subject to his orders. *Lane v. Cotton*, 1 *Ld. Raym.* 646, 12 *Mod.* 472; *Whitfield v. Le De Spencer*, *Cowp.* 754; *Dunlop v. Munroe*, 7 *Cranch*, 242, 3 *L. Ed.* 329; *Schroyer v. Lynch*, 8 *Watts*, 453; *Bishop v. Williamson*, 11 *Me.* 495; *Hutchins v. Brackett*, 22 *N. H.* 252, 53 *Am. Dec.* 248. The ruling at the trial was therefore right, and the plaintiff, having consented to a verdict for the defendant, reserving only the correctness of the ruling, cannot now raise the question whether there was sufficient evidence of the defendant's own negligence to be submitted to the jury.

Judgment on the verdict.

(See also *Teall v. Felton*, 1 *N. Y.* 537, 49 *Am. Dec.* 352; *Id.*, 12 *How.* 285, 13 *L. Ed.* 990; *Wiggins v. Hathaway*, 6 *Barb.* 632; *Tracy v. Cloyd*, 10 *W. Va.* 19. It is held, however, that a postmaster who employs a clerk or assistant, independent of express authority, who is paid by him out of his own salary or means, is liable for the default or misfeasance of his clerk or assistant, as any private person would be for the acts of his agent or employee. *Raisler v. Oliver*, 97 *Ala.* 710, 12 *South.* 238, 38 *Am. St. Rep.* 213.)

(30 Cal. 190.)

**BOULWARE v. CRADDOCK, Constable, et al. (in part).**

(Supreme Court of California. July Term, 1866.)

**SHERIFFS AND CONSTABLES—WRONGFUL SEIZURE OF PROPERTY UNDER EXECUTION.**

A sheriff or constable who, under an execution, seizes and sells property not belonging to the execution debtor, although in his possession, is a mere trespasser, and liable to an action by the owner of the property without any demand before suit.

Appeal from District Court, Tenth Judicial District, Sutter County.

Action by W. Boulware against C. C. Craddock, a constable, and James O. Harris and Samuel H. Pippin, his bondsmen, to recover the value of two horses alleged to have been wrongfully seized and sold by Craddock as such constable. At the trial it appeared that plaintiff was the owner of the horses, and that they had strayed away from his premises, and that afterwards one Eaton had taken them into his possession; that defendant Craddock, as constable, having received an execution against Eaton, finding the horses in Eaton's possession, and supposing they were his property, seized and sold them as Eaton's property; that plaintiff was not informed of the seizure and sale of his horses until 15 days after the sale, when he informed Craddock that he owned the horses, and asked him where they were, and Craddock told him who the purchaser was and where he lived. Plaintiff did not make any demand on Craddock for the horses or their value before bringing suit. The court below held that a demand was necessary to entitle plaintiff to recover, and gave judgment for defendants. Plaintiff appealed.

**SHAFTER, J.** In an action against a sheriff for a seizure and conversion of the plaintiff's property, taken under process against a third person, a demand upon the defendant prior to the bringing of the suit is not necessary to a recovery. The sheriff, having misapplied his process, (and whether by mistake or design will make no difference,) stands in the position of every other trespasser, and is liable to an action the instant the trespass is committed. The circumstance that the property was in the possession of the execution debtor at the date of the seizure amounts to nothing except upon proof of fraud or commixture. The rule of the common law is correctly stated in *Ledley v. Hays*, 1 Cal. 160, and the correctness of that decision is impliedly recognized in *Daumiel v. Gorham*, 6 Cal. 44. See also *Codman v. Freeman*, 3 Cush. 314, and *Acker v. Campbell*, 23 Wend. 372.

The judgment is reversed, and the court below is directed to render judgment upon the findings in favor of the plaintiff.

RHODES, J., expressed no opinion.

(See, to the same effect, *State v. Koontz*, 83 Mo. 323; *Buck v. Colbath*, 3 Wall. 334, 18 L. Ed. 257; *Rankin v. Ekel*, 64 Cal. 446, 1 Pac. 895; *Symonds v. Hall*, 37 Me. 354, 59 Am. Dec. 53; *Welsh v. Cochran*, 63 N. Y. 181, 20 Am. Rep. 519.)

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(34 Minn. 92, 24 N. W. 327.)

WELSH v. WILSON.

(Supreme Court of Minnesota. July 24, 1885.)

**1. SHERIFFS AND CONSTABLES—LEVY OF EXECUTION—BREAKING OUTER DOOR OF DWELLING.**

Plaintiff occupied as her dwelling, a building containing only one room, and also carried on there her trade as a milliner, and kept and exposed for sale a stock of goods. *Held*, that the fact that she so used it to transact her business did not change its character as her dwelling, and that the sheriff, having an execution against her, was not authorized to break the outer door for the purpose of levying upon her goods, and such levy was invalid.

**2. SAME—MITIGATION OF DAMAGES.**

In an action for such wrongful levy, it could not avail the sheriff, in mitigation of damages, that he sold the goods and paid the proceeds to the execution creditor; the levy itself being invalid, every subsequent act based on it was but a continuation and aggravation of the original trespass.

Appeal from District Court, Waseca County.

Action by Kate G. Welsh against Hugh Wilson, sheriff of Waseca county, for an alleged wrongful levy of an execution on plaintiff's goods. From a judgment for plaintiff, rendered upon a trial by jury, defendant appealed.

GILFILLAN, C. J. Plaintiff occupied in Waseca a building one-story high, of only one room. In this she with her daughter slept, and did upon a kerosene stove what cooking she did, but usually got their meals at a restaurant. In it she also pursued her trade as a milliner, and kept in it for sale, and exposed for sale, a stock of millinery goods. It was fitted up like a store, with shelves, tables for counters, show-cases on the tables, and one in front, on and in which her goods were kept for sale. The defendant, sheriff of the county, having an execution against her property, went about 10 o'clock in the morning to the building, the door of which was then locked, put his hand through the window, a pane of which was broken, took the

lock off the door, entered, and levied on and removed her goods. The validity of the levy is only in question.

The room must be taken to have been the plaintiff's dwelling,—her abode,—not merely when closed to business, but at all times when she occupied it for her dwelling. The fact that she also used it to transact her business did not change its character in that respect. It being her dwelling, it was unlawful for the sheriff to break the outer door to effect an entrance for the purpose of serving civil process. This proposition has never been doubted, either in England or in this country. It is also well settled in this country—there being no authority to the contrary—that no valid levy can be made by means of such unlawful entry. We may perhaps regret that such is the rule,—may be able to see that unfortunate consequences will sometimes result from it,—but it is too firmly established to be disturbed, except by act of the legislature. The levy being invalid, nothing which the sheriff did pursuant to it was valid. Every subsequent act based on the levy, and depending on it for its lawfulness, was but a continuation and aggravation of the original trespass. It can therefore be of no avail to the sheriff that he sold the goods, and paid the proceeds to the execution creditor. In the cases where, as in *Howard v. Manderfield*, 31 Minn. 337, 17 N. W. 946, such subsequent appropriation has been allowed to operate in mitigation of damages, there has been a subsequent valid levy, not connected with the trespass, which gave validity to the sale and appropriation of the proceeds.

Judgment affirmed.

(See also *Semayne's Case*, 5 Coke, 91a; *Stearns v. Vincent*, 50 Mich. 209, 15 N. W. 86, 45 Am. Rep. 37; *State v. Beckner*, 132 Ind. 371, 31 N. E. 950, 32 Am. St. Rep. 257; *Haggerty v. Wilber*, 16 Johns. 287, 8 Am. Dec. 321; *Williams v. Spencer*, 5 Johns. 352; *Curtis v. Hubbard*, 4 Hill, 437, 40 Am. Dec. 292. The officer may, however, break into a shop, warehouse, storehouse, or other outbuilding, not connected with the dwelling house or within the curtilage. *Hodder v. Williams* [1895] 2 Q. B. 663; *Clark v. Wilson*, 14 R. I. 11; *Solinsky v. Lincoln Sav. Bank*, 85 Tenn. 368, 4 S. W. 836. And when he finds the outer door of the dwelling house open, and enters thereby, he can break inner doors. *Id.*)

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(5 Hill, 440.)

PEOPLE v. WARREN.

(Supreme Court of New York. July Term, 1843.)

**SHERIFFS AND CONSTABLES—ARREST UPON WARRANT REGULAR ON ITS FACE.**

A warrant regular on its face is a sufficient authority to a constable to make the arrest commanded therein, although he has *knowledge of facts* which render the warrant void for want of jurisdiction.

Certiorari to Court of General Sessions, Oneida County.

Indictment against defendant for assault and battery upon one Johnson, a constable, in resisting arrest by Johnson on a warrant, issued

by the inspectors of election of the city of Utica against defendant for interrupting the proceedings at an election by disorderly conduct in the presence of the inspectors. 1 Rev. St. N. Y. p. 137, § 37. The warrant was regular and sufficient upon its face. Defendant offered to prove that he had not been in the hearing or presence of the inspectors at any time during the election, and that Johnson knew it. The court excluded the evidence, and defendant was convicted, and moved for a new trial on a bill of exceptions.

PER CURIAM. Although the inspectors had no jurisdiction of the subject-matter, yet, as the warrant was regular upon its face, it was a sufficient authority for Johnson to make the arrest, and the defendant had no right to resist the officer. The knowledge of the officer that the inspectors had no jurisdiction is not important. He must be governed and is protected by the process, and cannot be affected by anything which he has heard or learned out of it. There are some dicta the other way; but we have held on several occasions that the officer is protected by process regular and legal upon its face, whatever he may have heard going to impeach it. *Webber v. Gay*, 24 Wend. 485; *Watson v. Watson*, 9 Conn. 140, 23 Am. Dec. 324.

New trial denied.

(The general rule that sheriffs, constables, and similar officers are protected in executing process, if the process issue from a court or judge having general jurisdiction over the subject-matter and authority of law to issue process of that nature, and if the process be "fair on its face," is considered ante, at pages 239-241. Additional valuable cases are *Woolsey v. Morris*, 96 N. Y. 311, 315; *Barr v. Boyles*, 96 Pa. 31; *Mangold v. Thorpe*, 33 N. J. Law, 134; *Jennings v. Thompson*, 54 N. J. Law, 55, 22 Atl. 1008 [an important case]; *Thurston v. Adams*, 41 Me. 419; *Rousey v. Wood*, 47 Mo. App. 465. The additional feature in *People v. Warren* was that the officer had *knowledge of facts* showing that there was no jurisdiction over the person against whom the process was directed. It is still held in New York that the officer is protected in executing process under such circumstances. *Young v. Stone*, 33 App. Div. 261, 53 N. Y. Supp. 656. In Ohio it is held that he is not obliged to serve such process, but that he will be justified if he does serve it. *Henline v. Reese*, 54 Ohio St. 599, 44 N. E. 269, 56 Am. St. Rep. 736. In a few states, however, the officer renders himself liable by enforcing such process. *Tellefsen v. Fee*, 168 Mass. 188, 46 N. E. 562, 45 L. R. A. 481, 60 Am. St. Rep. 379; *Grace v. Mitchell*, 31 Wis. 533, 11 Am. Rep. 613; *Leachman v. Dougherty*, 81 Ill. 324. See *Cooley on Torts* [2d Ed.] 544-547.)

## CRIMINAL CONVERSATION AND SEDUCTION.

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(134 Mass. 123, 45 Am. Rep. 307.)

BIGAUQUETTE v. PAULET.

(Supreme Judicial Court of Massachusetts. Suffolk. January 3, 1883.)

### CRIMINAL CONVERSATION—GROUNDS OF ACTION BY HUSBAND.

An action may be maintained by a husband for the loss of consortium with his wife which is implied from criminal conversation of the defendant with her, whether defendant's act was with or against her will, and although it may have caused no actual loss of her services to her husband.

#### Exceptions from Superior Court.

Action of tort by Noel Bigaouette against Henry Paulet in four counts. The first count was for seduction of plaintiff's wife; the second and fourth were for assaults upon her, and the third was for a rape; whereby plaintiff lost her comfort, assistance, society, and benefit. A bill of exceptions, allowed by the trial judge, was, in substance, as follows: The only witnesses were plaintiff and his wife. The wife testified that plaintiff was a workman in the factory of the Smith American Organ Company, in a subordinate capacity, under defendant, and that they were in the habit of visiting each other occasionally with their wives; that on some occasions, previously to July 5, 1876, defendant told plaintiff's wife that he would turn her husband away from the factory, if she refused to receive defendant's visits; that on July 5, 1876, defendant violently and forcibly ravished her, and that he also immediately showed her a pistol, and threatened to shoot her if she should ever tell her husband; that she was at that time four months pregnant with child; that her child was born on December 11, 1876; that on December 16, 1876, she first told her husband of what had occurred between her and defendant, and three days afterwards plaintiff was discharged from the factory by defendant; that shortly after July 5, 1876, plaintiff saw black and blue marks on his wife's arms and legs, and observed that she was ill; that she had no physician, and they kept no servant to assist her, and that she attended to and performed her ordinary domestic duties in her husband's family up to the time of her confinement, but that her performance of these duties was attended with pain and difficulty to herself. The plaintiff also testified to some of the above facts, and then rested his case. The defendant contended, the foregoing being all the material testimony in the case, that there was not sufficient evidence of loss of the wife's services to enable the plaintiff to maintain

this action. The judge ruled that as there was no evidence to support the count charging defendant with seducing plaintiff's wife, and as the evidence applicable to the counts for assault and rape proved that no loss of service was caused to plaintiff, the action could not be maintained, and directed a verdict for defendant. Plaintiff alleged exceptions.

W. ALLEN, J. The plaintiff cannot maintain this action for an injury to the wife only. He must prove that some right of his own in the person or conduct of his wife has been violated. A husband is not the master of his wife, and can maintain no action for the loss of her services as his servant. His interest is expressed by the word "consortium,"—the right to the conjugal fellowship of the wife, to her company, co-operation, and aid in every conjugal relation. Some acts of a stranger to a wife are of themselves invasions of a husband's right, and necessarily injurious to him; others may or may not injure him, according to their consequences; and, in such cases, the injurious consequences must be proved, and it must be shown that the husband actually lost the company and assistance of his wife. This is illustrated in the statements of injuries to a husband in 3 Bl. Comm. 139, 140, where such injuries are said to be principally three: "Abduction, or taking away a man's wife; adultery, or criminal conversation with her; and beating or otherwise abusing her." The first two are of themselves wrongs to the husband, and his remedy is by action of trespass *vi et armis*. In regard to the other, the author's words are: "If it be a common assault, battery, or imprisonment, the law gives the usual remedy to recover damages, by action of trespass *vi et armis*, which must be brought in the names of the husband and wife jointly; but if the beating or other maltreatment be very enormous, so that thereby the husband is deprived for any time of the company and assistance of the wife, the law then gives him a separate remedy by an action of trespass, in nature of an action upon the case, for this ill usage, *per quod consortium amisit*, in which he shall recover a satisfaction in damages." He states, as one of the circumstances affecting the damages in an action for adultery, "the seduction or otherwise of the wife, founded on her previous behavior and character."

It is usual in actions for criminal conversation to allege the seduction of the wife, and the consequent alienation of her affections, and loss of her company and assistance, and sometimes of her services; but these are matter of aggravation, except so far as they are the statement of a legal inference from the fact itself, and actual proof of them is not necessary to the husband's right of action. The loss of the consortium is presumed, although the wife may have herself been the seducer, or may not have been living with the husband. A husband who is living apart from his wife, if he has not renounced his

marital rights, can maintain the action; and it is not necessary for him to prove alienation of the wife's affection, or actual loss of her society and assistance. See *Chambers v. Caulfield*, 6 East, 244; *Wilton v. Webster*, 7 Car. & P. 198; *Yundt v. Hartrunft*, 41 Ill. 9. The essential injury to the husband consists in the defilement of the marriage bed,—in the invasion of his exclusive right to marital intercourse with his wife, and to beget his own children. This presumes the loss of the consortium with his wife, of comfort in her society in that respect in which his right is peculiar and exclusive. Although actions of this nature have generally been brought where the alienation of the wife's affections, and actual deprivation of her society and assistance, have been the prominent injury to the husband, yet it is plain that the seduction of the wife, inducing her to violate her conjugal duties, and injuries arising from that, are not the foundation of the action. The original and approved form of action is trespass *vi et armis*, and, though this form was adopted when the act was with the consent of the wife, it was for the reason, as given by Chief Justice Holt, "that the law indulges the husband with an action of assault and battery for the injury done to him, though it be with the consent of his wife, because the law will not allow her consent in such case to the prejudice of her husband, because of the interest he has in her." *Rigaut v. Gallisard*, 7 Mod. 78, 2 Ld. Raym. 809, Holt, 50. See, also, *Bac. Abr. "Trespass," C 1*; and *Id. "Marriage," F 2*; 2 Chit. Pl. (13th Amer. Ed.) 855; *Reeve, Dom. Rel.* 63. The fact that trespass, and not case, was the form of action, even when the wrong was accomplished by the seduction of the wife, for the reason that the wife was deemed incapable of consent, and "force and violence were supposed in law to accompany this atrocious injury," indicates that the cause of action arose from acts committed upon the person of the wife, and not from influences exerted upon her mind; that the corrupting of the body, rather than the mind, of the wife was the original and essential wrong to the husband.

We think that this action may be maintained upon the evidence offered, not for the actual loss of comfort, assistance, society, and benefit alleged in the second and fourth counts as consequences of the assaults set forth in them, but for the loss of the consortium with the wife which is implied from criminal conversation with her, whether with or against her will.

Exceptions sustained.

(See also *Jacobsen v. Siddal*, 12 Or. 280, 7 Pac. 108, 53 Am. Rep. 360; *Wales v. Miner*, 89 Ind. 118; *Johnston v. Disbrow*, 47 Mich. 59, 10 N. W. 79; *Heermance v. James*, 47 Barb. 120.)

(11 N. Y. 343.)

## MULVEHALL v. MILLWARD.

(Court of Appeals of New York. September Term, 1854.)

## SEDUCTION—GROUNDS OF ACTION BY PARENT.

Plaintiff's minor daughter, who had left his house to work for defendant, was seduced by the latter while in his employ, and became pregnant. She thereafter worked at other places, but did not return to her father's house, nor did it appear that she had any intention to return there, until after her confinement and the birth of her child; and it was not shown that her father took any care of her or expended any money on her account during her pregnancy or sickness. *Held* that, as he had not surrendered his legal right to her services, he could maintain an action for her seduction.

Appeal from Superior Court of New York City, General Term.

Action for the seduction of plaintiff's daughter by defendant. At the trial, in March, 1852, the daughter testified that she was then residing with her father, the plaintiff, and that she had attained the age of 21 years in January, 1852; that in November, 1850, she had left her father, and had gone to work for defendant; that a few weeks afterwards, while in the employ of defendant, she was seduced by him, and became pregnant; that subsequently, and before the birth of her child, she worked for others; and that she was delivered of the child at another place. There was no evidence that she returned to her father's from the time she went to work for the defendant until after her recovery from her sickness at her confinement, or that her father took any care of her, or expended any money on her account, during her pregnancy or sickness. When plaintiff rested, defendant moved for a nonsuit, on the ground "that no expense or actual loss of service to the plaintiff had been proved." The motion was denied, and defendant excepted. Evidence was then given for defendant, and the cause submitted to the jury, which found a verdict for plaintiff for \$3,000. Judgment for plaintiff was entered on the verdict, and was affirmed on appeal to the general term of the superior court. From the judgment of the general term defendant again appealed.

EDWARDS, J. It was proved upon the trial that the plaintiff's daughter, at the time of her seduction, was in the defendant's service, and it did not appear that there was animus revertendi, or that she, in fact, returned to her father's house until after her confinement. Upon this state of facts it was contended upon the part of the defendant that, as no expense or actual loss of service on the part of the plaintiff was proved, he should be nonsuited, and a motion was made to that effect, which was overruled. In the case of *Dean v. Peel*, 5 East, 45, the plaintiff's daughter at the time of her seduction was under age, but was living in the family of another person, in

the capacity of a housekeeper, with no intention at the time of her seduction of returning to her father's house, although she did return there while she was under age, in consequence of her seduction, and was maintained by her father. Upon this state of facts it was held that, as the daughter was actually in the service of another person than her father, and as there was no *animus revertendi*, the action could not be maintained. The rule thus laid down has been since followed in the English courts. *Blaymire v. Haley*, 6 Mees. & W. 55; *Harris v. Butler*, 2 Mees. & W. 539; *Grinnell v. Wells*, 7 Man. & G. 1033. In a few years after the decision in *Dean v. Peel*, a somewhat similar case arose in this state, in which it appeared that the plaintiff's daughter, who was under age, went, with the consent of her father, to live with her uncle, for whom she worked when she pleased, and he agreed to pay her for her work; but there was no agreement that she should continue to live in his house for any fixed time. While in her uncle's house she was seduced, and got with child. Immediately afterwards she returned to her father's house, where she was maintained, and the expense of her lying-in was paid by him. Upon this state of facts it was held, contrary to the case above cited, that the action could be maintained. In delivering the opinion of the court, Spencer, C. J., said: "The case of *Dean v. Peel* is against the action. In the present case the father had made no contract binding out his daughter, and the relation of master and servant did exist from the legal control he had over her services; and, although she had no intention of returning, that did not terminate the relation, because her volition could not affect his rights. She was his servant *de jure*, though not *de facto*, at the time of the injury; and, being his servant *de jure*, the defendant has done an act which has deprived the father of the daughter's services, and which he might have exacted but for that injury." *Martin v. Payne*, 9 Johns. 387, 6 Am. Dec. 288. This decision was afterwards approved of in *Nickleston v. Stryker*, 10 Johns. 115, 6 Am. Dec. 318. In the case of *Clark v. Fitch*, 2 Wend. 459, 20 Am. Dec. 639, it was proved upon the trial that the plaintiff told his daughter that she might remain at home or go out to service as she pleased, but, if she left his house, she must take care of herself, and he relinquished all claim to her wages and services. It was contended that there was a distinction between this case and that of *Martin v. Payne*, on the ground, (1) that the father had given his daughter her time absolutely; (2) that he had in fact incurred no expense; but it was held that this made no difference, and that the personal rights of the father over the child were not relinquished. In the recent case of *Bartley v. Richtmyer*, 4 N. Y. 38, 53 Am. Dec. 338, Bronson, C. J., in giving the opinion of the court, says that "our cases hold that the relation of master and servant may exist for the purposes of this action, although the daughter was in the service of a third person at the time of her seduction, provided the case be such that the father

had then a legal right to her services, and might have commanded them at pleasure." But it was there held that the step-father had no such right, and consequently could not maintain the action. In Pennsylvania a similar rule has been adopted. *Hornketh v. Barr*, 8 Serg. & R. 36, 11 Am. Dec. 568; *Plumer v. Robertson*, 6 Serg. & R. 179. See, also, *Mercer v. Walmsley*, 5 Har. & J. 27, 9 Am. Dec. 486. And Greenleaf, in his treatise on Evidence, lays it down as the established American rule. 2 Greenl. Ev. § 576. Whether it be more or less consistent with principle and policy than the English rule it is now too late to inquire. It is too well established by authority. The case of *Dain v. Wycoff*, 7 N. Y. 191, was cited on the part of the defendant; but it will be seen, by reference to the opinion delivered in that case, that it was decided upon the very distinction which has been laid down in the adjudications referred to. In that case the plaintiff's daughter was bound out to service to another, and the plaintiff had no right to her services. The judgment should be affirmed.

All the judges, except RUGGLES, who did not hear the argument and took no part in the decision, concurred.

Judgment affirmed.

(This doctrine of "constructive service," as regards minor daughters, is generally accepted in this country. *Gray v. Durland*, 51 N. Y. 424; *Middleton v. Nichols*, 62 N. J. Law, 636, 43 Atl. 575; *Kennedy v. Shea*, 110 Mass. 147; *Riddle v. McGinnis*, 22 W. Va. 253; *Lavery v. Crooke*, 52 Wis. 612, 9 N. W. 599, 38 Am. Rep. 768. But the case of *Dean v. Peel* is still good law in England. *Hedges v. Tagg*, L. R. 7 Ex. 283; *Whitbourne v. Williams* [1901] 2 K. B. 722. As regards adult daughters, a father can sue if the daughter resided in his family and performed some acts of service, however slight. *Beaudette v. Gagne*, 87 Me. 534, 33 Atl. 23; *Hudkins v. Haskins*, 22 W. Va. 645; *Garretson v. Becker*, 52 Ill. App. 255.)

## NEGLIGENCE.

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### I. NEGLIGENCE GIVES A CAUSE OF ACTION WHEN IT VIOLATES A LEGAL DUTY.

(101 N. Y. 391, 4 N. E. 752, 54 Am. Rep. 718.)

LARMORE v. CROWN POINT IRON CO.

(Court of Appeals of New York. February 9, 1886.)

#### NEGLIGENCE—DANGEROUS PREMISES—DEFECTIVE MACHINE.

A person who goes upon the land of another without invitation, to secure employment from the owner of the land, is not entitled to indemnity from such owner for an injury happening from the operation of a defective machine on the premises, not obviously dangerous, which he passes in the course of his journey, though he can show that the owner might have ascertained the defect by the exercise of reasonable care, for as to such person there is no violation of a legal duty.

Appeal from Supreme Court, General Term, Third Department.

Action by Dennis Larmore against the Crown Point Iron Company for personal injuries caused by the alleged negligence of defendant. Verdict and judgment for plaintiff. A motion for a new trial was denied, and defendant appealed to the general term, which affirmed the judgment, and defendant again appealed.

ANDREWS, J. We are unable to perceive, upon the evidence in this case, that any duty rested on the defendant to keep the whimsey in repair for the protection of the plaintiff. The defendant, for its own purposes, and in the prosecution of its business, had constructed a machine for raising ore from its mines. It consisted of an upright, or mast, in which a lever was inserted by the device of a mortise and tenon, and, as an additional precaution for keeping the lever in place, an iron pin was driven through the mast and tenon. The machine was worked by attaching horses to the end of the lever, by means whereof a bucket filled with ore was raised from the mine to the surface of the ground, and, when discharged, the bucket, by its own weight, descended, turning the lever with some rapidity in its descent. The lever, on the occasion in question, while the bucket was descending, was thrown out of the socket at the mast, and, flying around, hit and broke the legs of the plaintiff, who was in a path leading to one of the pits worked by the defendant. The machine had been in use several years without accident. It appeared, on examination of the lever, after the occurrence in question, that the pin which held it to the mast had broken through the wood of the tenon, back of

the point where the pin passed through it, and the lever, not being firmly held to its place by the other arrangements, came out, and caused the injury. There was evidence that other and surer precautions might have been, and in other mines had sometimes been, taken, to secure the lever to the mast, than those adopted by the defendant. But the judge excluded the question of faulty construction from the jury, and submitted to them, as the sole ground of negligence to be considered, whether the defendant had omitted to make proper inspection of the machine, to discover defects arising after its original construction, or to make proper repairs to render it safe.

The negligence of the defendant, if any, upon the case as presented, consisted in an omission to take affirmative measures to ascertain and remedy defects in a machine originally suitable, developed by use, and which might have been discovered by proper inspection. It may be assumed, and the assumption is justified by decided cases, that, as to persons standing in certain relations to the defendant, a duty rested upon the company to exercise reasonable care in the maintenance and reparation of the machine, and that a failure to perform it would subject the defendant to liability to persons occupying such special relations, who should sustain injury from the omission. But the plaintiff stood in no such relation to the defendant as imposed upon it the duty to keep the machine in repair. He was, at the time of the accident, in every legal sense a stranger to the defendant. He had before that been employed by the superintendent of the company to work by the day, and had been assigned to a particular service, which, however, he had abandoned two days before the accident, and on the day of the accident he went upon the defendant's land to seek further employment at a pit, to which the path used by the workmen led, on which he was standing when the accident happened. He was on the premises at most by the mere implied sufferance or license of the defendant, and not on its invitation, express or implied; nor was he there, in any proper sense, on the business of the company. The suggestion made to him by the foreman at pit No. 5, two days before the accident, on the occasion of his refusing to work at that pit any longer, on account of the supposed danger, that he could probably "get a chance" at some other pit, was not an authority or invitation by the company to him to visit the other pits on the premises. The foreman had no authority to give the plaintiff permission to go elsewhere upon the defendant's lands, and the suggestion was obviously a mere friendly one, made by the foreman in the interest of the plaintiff. The fact that the plaintiff had, on going to pit No. 10, engaged to commence work there on the following Monday, did not change his relation to the defendant, or make him other than a mere licensee on the premises. He went there on his own business, and in returning he was subserving his own purposes only.

The precise question is whether a person who goes upon the land of another without invitation, to secure employment from the owner of the land, is entitled to indemnity from such owner for an injury happening from the operation of a defective machine on the premises, not obviously dangerous, which he passes in the course of his journey, if he can show that the owner might have ascertained the defect by the exercise of reasonable care. We know of no case which goes to this extent. There is no negligence, in a legal sense, which can give a right of action, unless there is a violation of a legal duty to exercise care. The duty may exist as to some persons, and not as to others, depending upon peculiar relations and circumstances. An employer is required to take reasonable precautions and to exercise reasonable care in providing safe machinery and appliances for the use of his servant. The duty arises out of the relation. *Fuller v. Jewett*, 80 N. Y. 46, 36 Am. Rep. 575. The owner of land, in general, may use it as he pleases, and leave it in such condition as he pleases; but he cannot, without giving any warning, place thereon spring-guns or dangerous traps which may subject a person innocently going on the premises, though without actual permission or license, to injury, without liability. The value of human life forbids measures for the protection of the possession of real property against a mere intruder, which may be attended by such ruinous consequences. The duty in this case grows out of the circumstances, independently of any question of license to enter the premises. *Bird v. Holbrook*, 4 Bing. 628. So, also, where the owner of land, in the prosecution of his own purposes or business, or of a purpose or business in which there is a common interest, invites another, either expressly or impliedly, to come upon his premises, he cannot with impunity expose him to unreasonable or concealed dangers; as, for example, from an open trap in a passage-way. The duty in this case is founded upon the plainest principles of justice. *Corby v. Hill*, 4 C. B. (N. S.) 556; *Smith v. London, etc., Docks Co.*, L. R. 3 C. P. 326; *Holmes v. Railway Co.*, L. R. 6 Exch. 123. The duty of keeping premises in a safe condition, even as against a mere licensee, may also arise where affirmative negligence in the management of the property or business of the owner would be likely to subject persons exercising the privilege theretofore permitted and enjoyed, to great danger. The case of running a locomotive, without warning, over a path across the railroad, which had been generally used by the public without objection, furnishes an example. *Barry v. Railway Co.*, 92 N. Y. 289, 44 Am. Rep. 377. See, also, *Beck v. Carter*, 68 N. Y. 283, 23 Am. Rep. 175.

The cases referred to proceed upon definite and intelligible grounds, the justice of which cannot reasonably be controverted. But in the case before us there were no circumstances creating a duty on the

part of the defendant, to the plaintiff, to keep the whimsey in repair, and consequently no obligation to remunerate the latter for his injury. The machine was not intrinsically dangerous. The plaintiff was a mere licensee. The negligence, if any, was passive, and not active,—of omission, and not of commission. Under the circumstances, we think the motion for nonsuit should have been granted. See *Severy v. Nickerson*, 120 Mass. 306, 21 Am. Rep. 514; *Hounsell v. Smyth*, 7 C. B. (N. S.) 731.

The judgment should therefore be reversed, and a new trial ordered.

RAPALLO, EARL, and FINCH, JJ., concur. DANFORTH, J., concurs in result. RUGER, C. J., dissenting. MILLER, J., not voting.

(Towards an invitee reasonable care must be exercised by the landowner to have the premises in a safe condition. *Flynn v. Central Val. R. Co.*, 142 N. Y. 439, 37 N. E. 514; *Phillips v. Library Co.*, 55 N. J. Law, 307, 27 Atl. 478 [a valuable decision]; *Sweeney v. Railroad Co.*, 10 Allen, 368, 87 Am. Dec. 644; *Davis v. Central Cong. Soc.*, 129 Mass. 367, 37 Am. Rep. 368; *Bennett v. Railroad Co.*, 102 U. S. 577, 26 L. Ed. 235; *Tucker v. Draper*, 62 Neb. 66, 86 N. W. 917, 54 L. R. A. 321; *Heaven v. Pender*, 16 Q. B. D. 503; *Indermaur v. Dames*, L. R. 1 C. P. 274, 2 C. P. 311. But this duty does not extend to the invitee while he is using the premises for a purpose beyond the limits of the invitation. *Ryerson v. Bathgate*, 67 N. J. Law, 337, 51 Atl. 708, 57 L. R. A. 307. Towards a licensee, on the other hand, the only duty is not to be guilty of active negligence—to refrain from acts willfully injurious. The licensee is to take the premises as he finds them. *Cusick v. Adams*, 115 N. Y. 59, 21 N. E. 673, 12 Am. St. Rep. 772; *Land v. Fitzgerald*, 68 N. J. Law, 28, 52 Atl. 229; *Taylor v. Haddonfield & C. Turnpike Co.*, 65 N. J. Law, 102, 46 Atl. 707; *Shea v. Gurney*, 163 Mass. 184, 39 N. E. 996, 47 Am. St. Rep. 446; *Hart v. Cole*, 156 Mass. 475, 31 N. E. 644, 16 L. R. A. 557; *Muench v. Heinemann* [Wis.] 96 N. W. 800. "Speaking generally, where the privilege of user exists for the common interest or mutual advantage of both parties, it will be held to be a case of invitation; but if it exists for the mere pleasure and benefit of the party exercising the privilege, it will be held a case of license." *Pomponio v. New York, N. H. & H. R. Co.*, 66 Conn. 528, 537, 34 Atl. 491, 32 L. R. A. 530, 50 Am. St. Rep. 124; *Furey v. New York Cent. R. Co.*, 67 N. J. Law, 270, 51 Atl. 505; *Sterger v. Van Sicklen*, 132 N. Y. 499, 30 N. E. 987, 16 L. R. A. 640, 28 Am. St. Rep. 594.

Even towards trespassers there is a duty to refrain from wanton or reckless carelessness endangering their lives or bodily safety. *McGuinness v. Butler*, 159 Mass. 233, 236, 34 N. E. 259, 38 Am. St. Rep. 412; *Rodgers v. Lees*, 140 Pa. 475, 21 Atl. 399, 12 L. R. A. 216, 23 Am. St. Rep. 250; *Ansteth v. Buffalo R. Co.*, 145 N. Y. 210, 39 N. E. 708, 45 Am. St. Rep. 607.)

(18 R. I. 563, 29 Atl. 6, 27 L. R. A. 512, 49 Am. St. Rep. 790.)

**BEEHLER v. DANIELS, CORNELL & CO. et al. (in part).**

(Supreme Court of Rhode Island. May 1, 1894.)

**DANGEROUS PREMISES—ELEVATOR WELL—FIREMAN.**

In the absence of statute requiring guards or other means of protection, or of invitation upon the premises, the owner is not liable to a fireman, who has entered in the course of his duty at a fire, for injuries sustained in falling into an unguarded elevator well, and that, too, even though the merchandise was so packed as to conduct one to the unprotected well. A fireman enters as a licensee, toward whom there is no legal duty, by common law, to exercise reasonable care that the premises shall be safe.

Action by Henry R. Beehler against Daniels, Cornell & Co. for damages for personal injuries. Demurrer to declaration sustained.

STINESS, J. The plaintiff seeks to recover for injuries caused by falling into an elevator well in the defendants' building, which he entered in the discharge of his duty as a member of the fire department of the city of Providence in answering a call to extinguish a fire. The negligence alleged in the first count is a failure to guard and protect the well; and, in the second count, such a packing of merchandise as to guide and conduct one to the unguarded and unprotected well. The defendants demur to the declaration, alleging as grounds of demurrer that they owed no duty to the plaintiff; that he entered their premises in the discharge of a public duty, and assumed the risks of his employment; that he was in the premises without invitation from them; and that they are not liable for consequences which they could not and were not bound to foresee. The decisive question thus raised is, did the defendants, under the circumstances, owe to the plaintiff a duty, for failure in which they are liable to him in damages? The question is not a new one, and we think it is safe to say that it has never been answered otherwise than in favor of the defendants. The plaintiff argues that it was his duty to enter the premises, and, consequently, since an owner may reasonably anticipate the liability of a fire, a duty arises from the owner to the fireman to keep his premises guarded and safe. An extension of this argument to its legitimate result, as a rule of law, is sufficiently startling to show its unsoundness. The liability to fire is common to all buildings and at all times; hence every owner of every building must at all times keep every part of his property in such condition that a fireman, unacquainted with the place, and groping about in darkness and smoke, shall come upon no obstacle, opening, machine, or anything whatever which may cause him injury. This argument was urged in *Woodruff v. Bowen*, 136 Ind. 431, 34 N. E. 1113, 22 L. R. A. 198, but the court said: "We are of the opinion that the owner of a building in

a populous city does not owe it as a duty, at common law, independent of any statute or ordinance, to keep such building safe for firemen or other officers who in a contingency may enter the same under a license conferred by law." Undoubtedly the plaintiff in this case had the right to enter the defendants' premises, and the character of his entry was that of a licensee. *Cooley, Torts*, 313. But no such duty as is averred in this declaration is due from an owner to a licensee. There is a clear distinction between a license and an invitation to enter premises, and an equally clear distinction as to the duty of an owner in the two cases. An owner owes to a licensee no duty as to the condition of premises, unless imposed by statute, save that he should not knowingly let him run upon a hidden peril, or willfully cause him harm; while to one invited he is under obligation for reasonable security for the purposes of the invitation. The plaintiff's declaration does not set out a cause of action upon either of these grounds, and the cases cited and relied on by him fall within the two classes of cases described, and mark the line of duty very clearly. *Parker v. Barnard*, 135 Mass. 116, 46 Am. Rep. 450, was the case of a police officer who had entered a building, the doors of which were found open in the night-time, to inspect it, according to the rules of the police department, and fell down an unguarded elevator well. A statute required such wells to be protected by railings and trap doors. Judgment having been given for the defendant at the trial, a new trial was ordered upon the ground of a violation of the statute. The court says: "The owner or occupant of land or a building is not liable, at common law, for obstructions, pitfalls, and other dangers there existing, as, in the absence of any inducement or invitation to others to enter, he may use his property as he pleases. But he holds his property subject to such reasonable control and regulation of the mode of keeping and use as the legislature, under the police power vested in them by the constitution of the commonwealth, may think necessary for the preventing of injuries to the rights of others and the security of the public health and welfare." Then, likening the plaintiff to a fireman, the court also says: "Even if they must encounter the danger arising from neglect of such precautions against obstructions and pitfalls as those invited or induced to enter have a right to expect, they may demand, as against the owners or occupants, that they observe the statute in the construction and management of their building." In *Learoyd v. Godfrey*, 138 Mass. 315, a police officer fell down an uncovered well in or near a passageway to a house where he was called to quell a disturbance of the peace. A verdict for the plaintiff was sustained upon the ground that the jury must have found that the officer was using the passageway by the defendant's invitation, and that the evidence warranted the finding. *Gordon v. Cummings*, 152 Mass. 513, 25 N. E. 978, 9 L. R. A. 640, 23 Am. St. Rep. 846, was the case of a letter carrier

who fell into an elevator well in a hallway where he was accustomed to leave letters in boxes put there for that purpose. The court held that there was an implied invitation to the carrier to enter the premises. In *Engel v. Smith*, 82 Mich. 1, 46 N. W. 21, 21 Am. St. Rep. 549, the plaintiff fell through a trap door left open in a building where he was employed. The question of duty is not discussed in the case, but simply the fact of negligence. In *Bennett v. Railroad Co.*, 102 U. S. 577, 26 L. Ed. 235, the plaintiff, a passenger, fell through a hatch hole in the depot floor. The court construed the declaration as setting out facts which amounted to an invitation to the plaintiff to pass over the route which he took through the shed depot where the hatch hole was. In the present case the plaintiff sets out no violation of a statute, or facts which amounted to an invitation, and, consequently, under the well-settled rule of law, the defendants were under no liability to him for the condition of their premises or the packing of their merchandise. The demurrer to the declaration must therefore be sustained.

(Similar decisions as to firemen are *Hamilton v. Minneapolis Co.*, 78 Minn. 3, 80 N. W. 693, 79 Am. St. Rep. 350; *Gibson v. Leonard*, 143 Ill. 182, 32 N. E. 182, 17 L. R. A. 588, 36 Am. St. Rep. 376.)

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## II. LIABILITY FOR NEGLIGENCE CONTRASTED WITH ABSOLUTE LIABILITY.

(38 N. J. Law, 339, 20 Am. Dec. 394.)

MARSHALL v. WELWOOD et al.

(Supreme Court of New Jersey. June Term, 1876.)

### NEGLECT—EXPLOSION OF STEAM-BOILER.

An owner is not liable for injuries caused by the explosion of a steam-boiler used by him on his premises, without proof of want of due care and skill on the part of him or his agent.

Motion for new trial.

Action by Maurice F. Marshall against Joseph Welwood and Melville Garside for damages to plaintiff's property caused by the explosion of a steam-boiler on defendant Welwood's adjoining premises, which boiler Welwood had bought from defendant Garside, who was experimenting with it at the time of the explosion. The verdict was for plaintiff against both defendants. Defendants moved for a new trial.

Argued before BEASLEY, C. J., and WOODHULL, VAN SYCKEL, and SCUDDER, JJ.

BEASLEY, C. J. The judge at the trial of this cause charged, among other matters, that as the evidence incontestably showed that one of the defendants, Welwood, was the owner of the boiler which caused the damage, he was liable in the action, unless it appeared that the same was not being run by him, or his agent, at the time of the explosion. The proposition propounded was that a person is responsible for the immediate consequences of the bursting of a steam-boiler, in use by him, irrespective of any question as to negligence or want of skill on his part. This view of the law is in accordance with the principles maintained, with great learning and force of reasoning, in some of the late English decisions. In this class the leading case is that of *Fletcher v. Rylands*, L. R. 1 Exch. 265, which was a suit on account of damage done by water escaping onto the premises of the plaintiff from a reservoir which the defendant had constructed, with due care and skill, on his own land. The judgment was put on a general ground, for the court said: "We think the true rule of law is that the person who, for his own purposes, brings on his lands and collects and keeps there anything likely to do mischief if it escapes, must keep it in at his peril, and, if he does not do so, is *prima facie* answerable for all the damage which is the natural consequence of its escape." This result was deemed just, and was sought to be vindicated on the theory that it is but reasonable that a person who has brought something on his own property which was not naturally there, harmless to others so long as it is confined to his own property, but which he knows to be mischievous if it gets on his neighbor's, should be obliged to make good the damage which ensues, if he does not succeed in confining it to his own property. This principle would evidently apply to and rule the present case; for water is no more likely to escape from a reservoir and do damage than steam is from a boiler; and therefore if he who collects the former force upon his property, and seeks, with care and skill, to keep it there, is answerable for his want of success, so is he who, under similar conditions, endeavors to deal with the latter. There is nothing unlawful in introducing water into a properly constructed reservoir on a person's own land, nor in raising steam in a boiler of proper quality. Neither act, when performed, is a nuisance *per se*; and the inquiry consequently is whether, in the doing of such lawful act, the party who does it is an insurer against all flaws in the apparatus employed, no matter how secret or unascertainable, by the use of every reasonable test, such flaws may be. This English adjudication takes the affirmative side of the question, conceding, however, that the subject is not controlled by any express decision, and that it is to be investigated with reference to the general grounds of jurisprudence.

I have said the doctrine involved has been learnedly treated, and the decision is of great weight, and yet its reasoning has failed to

convince me of the correctness of the result to which it leads, and such result is clearly opposed to the course which judicial opinion has taken in this country. The fallacy in the process of argument by which judgment is reached in this case of *Fletcher v. Rylands* appears to me to consist in this: that the rule mainly applicable to a class of cases which I think should be regarded as, in a great degree, exceptional, is amplified and extended into a general, if not universal, principle. The principal instance upon which reliance is placed is the well-known obligation of the owner of cattle to prevent them from escaping from his land and doing mischief. The law as to this point is perfectly settled, and has been settled from the earliest times, and is to the effect that the owner must take charge of his cattle at his peril, and, if they evade his custody, he is, in some measure, responsible for the consequences. This is the doctrine of the Year Books, but I do not find that it is grounded in any theoretical principle, making a man answerable for his acts or omissions, without regard to his culpability. That in this particular case of escaping cattle so stringent an obligation upon the owner should grow up, was not unnatural. That the beasts of the land-owner should be successfully restrained was a condition of considerable importance to the unmolested enjoyment of property, and the right to plead that the escape had occurred by inevitable accident would have seriously impaired, if it did not entirely frustrate, the process of distress damage-feasant. Custom has had much to do in giving shape to the law, and what is highly convenient readily runs into usage, and is accepted as a rule. It would but rarely occur that cattle would escape from a vigilant owner, and in this instance such rare exceptions seem to have passed unnoticed, for there appears to be no example of the point having been presented for judicial consideration; for the conclusion of the liability of the negligent owner rests in dicta, and not in express decision. But, waiving this, there is a consideration which seems to me to show that this obligation, which is put upon the owner of errant cattle, should not be taken to be a principle applicable, in a general way, to the use or ownership of property, which is this: that the owner of such cattle is, after all, liable only *sub modo* for the injury done by them; that is, he is responsible, with regard to tame beasts who have no exceptionally vicious disposition so far as is known, for the grass they eat, and such like injuries, but not for the hurt they may inflict on the person of others,—a restriction on liability which is hardly consistent with the notion that this class of cases proceeds from a principle so wide as to embrace all persons whose lawful acts produce, without fault in them, and in an indirect manner, ill results which disastrously affect innocent persons. If the principle ruling these cases was so broad as this, conformity to it would require that the person, being the cause of the mischief, should stand as an indemnifier against the whole of the damage. It appears to me,

therefore, that this rule, which applies to damage done by straying cattle, was carried beyond its true bounds, when it was appealed to as proof that a person in law is answerable for the natural consequences of his acts, such acts being lawful in themselves, and having been done with proper care and skill.

The only other cases which were referred to in support of the judgment under consideration were those of a man who was sued for not keeping the wall of his privy repaired, to the detriment of his neighbor, being the case of *Tenant v. Golding*, 1 Salk. 21; and several actions which it is said had been brought against the owners of some alkali works for damages alleged to have been caused by the chlorine fumes escaping from their works, which works the case showed had been erected upon the best scientific principles. But I am compelled to think that these cases are but a slender basis for the large structure put upon it. The case of *Tenant v. Golding* presented merely the question whether a land-owner is bound in favor of his neighbor to keep the wall of his privy in repair, and the court held that he was, and that he was responsible if, for want of such reparation, the filth escaped on the adjoining land. No question was mooted as to his liability in case the privy had been constructed with care and skill, with a view to prevent the escape of its contents, and had been kept in a state of repair. Not to repair a receptacle of this kind was, in itself, a *prima facie* case of negligence, and it seems to me that all the court decided was to hold so. But this consideration is also to be noticed, both with respect to this last case, and that of the injurious fumes from the alkali works, that in truth they stand somewhat by themselves, and having this peculiarity: that the things in their nature partake largely of the character of nuisances. Take the alkali works as an example. Placed in a town, under ordinary circumstances, they would be a nuisance. When the attempt is made by scientific methods to prevent the escape of the fumes, it is an attempt to legalize that which is illegal, and the consequence is, it may well be held that, failing in the attempt, the nuisance remains. I cannot agree that from these indications the broad doctrine is to be drawn that a man in law is an insurer that the acts which he does, such acts being lawful and done with care, shall not injuriously affect others. The decisions cited are not so much examples of legal maxims as of exceptions to such maxims; for they stand opposed and in contrast to principles which it seems to me must be considered much more general in their operation and elementary in their nature. The common rule, quite institutional in its character, is that, in order to sustain an action for a tort, the damage complained of must come from a wrongful act. Mr. Addison, in his work on Torts, (volume I, p. 3,) very correctly states this rule. He says: "A man may, however, sustain grievous damage at the hands of another, and yet, if it be the result of inevitable accident, or a lawful act, done in a

lawful manner, without any carelessness or negligence, there is no legal injury, and no tort giving rise to an action for damages." Among other examples, he refers to an act of force, done in necessary self-defense, causing injury to an innocent by-stander, which he characterizes as *damnum sine injuria*, "for no man does wrong or contracts guilt in defending himself against an aggressor." Other instances of a like kind are noted, such as the lawful obstruction of the view from the windows of dwelling-houses; or the turning aside, to the detriment of another, the current of the sea or river, by means of walls or dykes. Many illustrations of the same bearing are to be found scattered through the books of reports. Thus Dyer, 25b, says "that, if a man have a dog which has killed sheep, the master of the dog being ignorant of such quality and property of the dog, the master shall not be punished for that killing." This case belongs to a numerous, well-known class, where animals which are usually harmless do damage; the decisions being that, under such conditions, the owners of the animals are not responsible. Akin to these in principle are cases of injury done to innocent persons by horses, in the charge of their owners, becoming ungovernable by reason of unexpected causes; or where a person in a dock was struck by the falling of a bale of cotton which the defendant's servants were lowering, (*Scott v. Dock Co.*, 3 Hurl. & C. 596;) or in cases of collision, either on land or sea, (*Hammack v. White*, 11 C. B., N. S. 588.)

It is true that these cases of injury done to personal property, or to persons, are, in the case of *Fletcher v. Rylands*, sought to be distinguished from other damages, on the ground that they are done in the course of traffic on the highways, whether by land or sea, which cannot be conducted without exposing those whose persons or property are near it to some inevitable risk. But this explanation is not sufficiently comprehensive; for if a frightened horse should, in his flight, break into an inclosure, no matter how far removed from the highway, the owner would not be answerable for the damage done. Nor is the reason upon which it rests satisfactory; for, if traffic cannot be carried on without some risk, why can it not be said, with the same truth, that the other affairs of life, though they be transacted away from the highways, cannot be carried on without some risk; and if such risk is, in the one case, to be borne by innocent persons, why not in the other? Business done upon private property may be a part of traffic as well as that done by means of the highway, and no reason is perceived why the same favor is not to be extended to it in both situations. But, besides this, the reason thus assigned for the immunity of him who is the unwilling producer of the damage has not been the ground on which the decisions illustrative of the rule have been put; the ground has been that the person sought to be charged had not done any unlawful act. Everywhere, in all branches of the law, the general principle that blame must be imputable as a

ground of responsibility for damage proceeding from a lawful act is apparent. A passenger is injured by the breaking of an axle of a public conveyance; the carrier is not liable, unless negligence can be shown. A man's guest is hurt by the falling of a chandelier; a suit will not lie against the host, without proof that he knew, or ought to have known, of the existence of the danger. If the steam-engine which did the mischief in the present case had been in use in driving a train of cars on a railroad, and had, in that situation, exploded, and had inflicted injuries on travelers or by-standers, it could not have been pretended that such damage was actionable, in the absence of the element of negligence or unskillfulness. By changing the place of the accident to private property, I cannot agree that a different rule obtains.

It seems to me, therefore, than in this case it was necessary to submit the matter, as a question of fact for the jury, whether the occurrence doing the damage complained of was the product of pure accident, or the result of want of care or skill on the part of the defendant or his agents. This view of the subject is taken in the American decisions. A case in all respects in point is that of *Losee v. Buchanan*, 51 N. Y. 476, 10 Am. Rep. 623. The facts were essentially the same with those of the principal case. It was an action growing out of the explosion of a steam-boiler upon private property, and the ruling was that such action could not be sustained without proof of fault or negligence. In that report the line of cases is so fully set out that it is unnecessary here to repeat them.

The rule should be made absolute.

(The case of *Fletcher v. Rylands*, L. R. 1 Exch. 265, was afterwards affirmed in the House of Lords. *Rylands v. Fletcher*, L. R. 3 H. L. 330. In *Losee v. Buchanan*, 51 N. Y. 476, 486, 10 Am. Rep. 623, it is said that "the law, as laid down in these cases, is in direct conflict with the law as settled in this country. Here, if one builds a dam upon his own premises and thus holds back and accumulates the water for his benefit, or if he brings water upon his premises into a reservoir, in case the dam or the banks of the reservoir give way and the lands of the neighbor are thus flooded, he is not liable for the damage without proof of some fault or negligence on his part." Many cases are cited in support of this statement. See also *Brown v. Collins*, 53 N. H. 442, 16 Am. Rep. 372, discussing this subject. In Massachusetts and Minnesota, however, the doctrine of *Rylands v. Fletcher* has been approved. *Gorham v. Gross*, 125 Mass. 232, 28 Am. Rep. 234; *Cahill v. Eastman*, 18 Minn. 324 (Gil. 292), 10 Am. Rep. 184. But recent cases in these states limit these earlier decisions somewhat. *Ainsworth v. Lakin*, 180 Mass. 397, 62 N. E. 746, 57 L. R. A. 132, 91 Am. St. Rep. 314; *Berger v. Minneapolis Gas-light Co.*, 60 Minn. 296, 62 N. W. 336.)

### III. CONTRIBUTORY NEGLIGENCE.

#### 1. General principle.

(95 U. S. 439, 24 L. Ed. 506.)

BALTIMORE & P. R. CO. v. JONES.

(Supreme Court of United States. October Term, 1877.)

#### 1. CONTRIBUTORY NEGLIGENCE—DEFEATING A RECOVERY.

Where a person's own negligence or want of ordinary care and caution so far contributes to an injury to himself that but for such negligence or want of ordinary care and caution on his own part the injury would not have happened, he cannot recover therefor.

#### 2. SAME—MASTER AND SERVANT.

Railroad workmen were accustomed to ride to and from their work on the pilot and tender of the engine of the work-train, though they had been informed that it was dangerous, and a box-car had been provided for them. In a collision between such work-train and cars standing on the track, plaintiff, riding on the pilot, was injured, while the workmen in the box-car were not injured. *Held*, that plaintiff was guilty of contributory negligence, which would defeat a recovery for his injuries in an action against the railroad company, and that it was no excuse that he was told by the engineer, when the train was starting, to "hurry up."

Error to the Supreme Court of the District of Columbia.

Action by William H. Jones against the Baltimore & Potomac Railroad Company to recover for personal injuries caused by the alleged negligence of defendant. Verdict and judgment were for plaintiff. Defendant sued out a writ of error.

SWAYNE, J. The defendant in error was the plaintiff in the court below. Upon the trial there he gave evidence to the following effect: For several months prior to the 12th of November, 1872, he was in the service of the company as a day laborer. He was one of a party of men employed in constructing and keeping in repair the road-way of the defendant. It was usual for the defendant to convey them to and from their place of work. Sometimes a car was used for this purpose; at others, only a locomotive and tender were provided. It was common, whether a car was provided or not, for some of the men to ride on the pilot or bumper in front of the locomotive. This was done with the approval of Van Ness, who was in charge of the laborers when at work, and the conductor of the train which carried them both ways. The plaintiff had no connection with the train. On the 12th of November, before mentioned, the party of laborers, including the plaintiff, under the direction of Van Ness, were employed on the west side of the eastern branch of the Potomac, near where the defendant's road crosses that stream, in filling flat-cars with dirt, and unloading them at an adjacent point.

The train that evening consisted of a locomotive, tender, and box-car. When the party was about to leave on their return that evening, the plaintiff was told by Van Ness to jump on anywhere; that they were behind time, and must hurry. The plaintiff was riding on the pilot of the locomotive, and while there the train ran into certain cars belonging to the defendant, and loaded with ties. These cars had become detached from another train of cars, and were standing on the track in the Virginia-Avenue tunnel. The accident was the result of negligence on the part of the defendant. Thereby one of the plaintiff's legs was severed from his body, and the other one severely injured. Nobody else was hurt, except two other persons, one riding on the pilot with the plaintiff, and the other one on the cars standing in the tunnel.

The defendant then gave evidence tending to prove as follows: About six weeks or two months before the accident a box-car had been assigned to the construction train with which the plaintiff was employed. The car was used thereafter every day. About the time it was first used, and on several occasions before the accident, Van Ness notified the laborers that they must ride in the car, and not on the engine; and the plaintiff in particular, on several occasions not long before the disaster, was forbidden to ride on the pilot, both by Van Ness and the engineer in charge of the locomotive. The plaintiff was on the pilot at the time of the accident, without the knowledge of any agent of the defendant. There was plenty of room for the plaintiff in the box-car, which was open. If he had been anywhere but on the pilot, he would not have been injured. The collision was not brought about by any negligence of the defendant's agents, but was unavoidable. The defendant's agents in charge of the two trains, and the watchman in the tunnel were competent men.

The plaintiff, in rebuttal, gave evidence tending to show that sometimes the box-car was locked when there was no other car attached to the train, and that the men were allowed by the conductor and engineer to ride on the engine, and that on the evening of the accident the engineer in charge of the locomotive knew that the plaintiff was on the pilot.

The evidence being closed, the defendant's counsel asked the court to instruct the jury as follows: "If the jury find from the evidence that the plaintiff knew the box-car was the proper place for him, and if he knew his position on the pilot of the engine was a dangerous one, then they will render a verdict for the defendant, whether they find that its agents allowed the plaintiff to ride on the pilot or not." This instruction was refused, and the defendant's counsel excepted.

Three questions arise upon the record: (1) The exception touching the admission of evidence. (2) As to the application of the rule relative to injuries received by one servant by reason of the negligence

of another servant, both being at the time engaged in the same service of a common superior. (3) As to contributory negligence on the part of the plaintiff.

We pass by the first two without remark. We have not found it necessary to consider them. In our view, the point presented by the third is sufficient to dispose of the case. Negligence is the failure to do what a reasonable and prudent person would ordinarily have done under the circumstances of the situation, or doing what such a person, under the existing circumstances, would not have done. The essence of the fault may lie in omission or commission. The duty is dictated and measured by the exigencies of the occasion. See Whart. Neg. § 1, and notes. One who by his negligence has brought an injury upon himself cannot recover damages for it. Such is the rule of the civil and of the common law. A plaintiff in such cases is entitled to no relief. But where the defendant has been guilty of negligence also, in the same connection, the result depends upon the facts. The question in such cases is (1) whether the damage was occasioned entirely by the negligence or improper conduct of the defendant; or (2) whether the plaintiff himself so far contributed to the misfortune by his own negligence, or want of ordinary care and caution, that but for such negligence or want of care and caution on his part the misfortune would not have happened. In the former case, the plaintiff is entitled to recover; in the latter, he is not. *Tuff v. Warman*, 5 C. B. (N. S.) 573; *Butterfield v. Forrester*, 11 East, 60; *Bridge v. Railroad Co.*, 3 Mees. & W. 244; *Davies v. Mann*, 10 Mees. & W. 546; *Clayards v. Dethick*, 12 Q. B. 439; *Van Lien v. Manufacturing Co.*, 14 Abb. Prac. (N. S.) 74; *Ince v. Ferry Co.*, 106 Mass. 149.

It remains to apply these tests to the case before us. The facts with respect to the cars left in the tunnel are not fully disclosed in the record. It is not shown when they were left there, how long they had been there, when it was intended to remove them, nor why they had not been removed before. It does appear that there was a watchman at the tunnel, and that he and the conductor of the train from which they were left, and the conductor of the train which carried the plaintiff, were all well selected, and competent for their places. For the purposes of this case, we assume that the defendant was guilty of negligence. The plaintiff had been warned against riding on the pilot, and forbidden to do so. It was next to the cow-catcher, and obviously a place of peril, especially in case of collision. There was room for him in the box-car. He should have taken his place there. He could have gone into the box-car in as little, if not less, time than it took to climb to the pilot. The knowledge, assent, or direction of the company's agents as to what he did is immaterial. If told to get on anywhere, that the train was late, and that he must hurry, this was no justification for taking such a risk. As well might

he have obeyed a suggestion to ride on the cow-catcher, or put himself on the track before the advancing wheels of the locomotive. The company, though bound to a high degree of care, did not insure his safety. He was not an infant nor non compos. The liability of the company was conditioned upon the exercise of reasonable and proper care and caution on his part. Without the latter, the former could not arise. He and another who rode beside him were the only persons hurt upon the train. All those in the box-car, where he should have been, were uninjured. He would have escaped also, if he had been there. His injury was due to his own recklessness and folly. He was himself the author of his misfortune. This is shown with as near an approach to a demonstration as anything short of mathematics will permit. The case is thus clearly brought within the second of the predicates of mutual negligence we have laid down. *Hickey v. Railroad Co.*, 14 Allen, 429; *Todd v. Railroad Co.*, 3 Allen, 18, 80 Am. Dec. 49; *Id.*, 7 Allen, 207, 83 Am. Dec. 679; *Gavett v. Railroad Co.*, 16 Gray, 501, 77 Am. Dec. 422; *Lucas v. Railroad Co.*, 6 Gray, 64, 66 Am. Dec. 406; *Ward v. Railroad Co.*, 11 Abb. Prac. (N. S.) 411; *Railroad Co. v. Yarwood*, 15 Ill. 468; *Doggett v. Railroad Co.*, 34 Iowa, 284. The plaintiff was not entitled to recover. It follows that the court erred in refusing the instruction asked upon this subject. If the company had prayed the court to direct the jury to return a verdict for the defendant, it would have been the duty of the court to give such direction, and error to refuse. *Gavett v. Railroad Co.*, supra; *Merchants' Bank v. State Bank*, 10 Wall. 604, 19 L. Ed. 1008; *Pleasants v. Fant*, 22 Wall. 121, 22 L. Ed. 780.

Judgment reversed, and the cause remanded, with directions to issue a venire de novo, and to proceed in conformity with this opinion.

(See also *Wilds v. Railroad Co.*, 24 N. Y. 430; *Rowen v. Railroad Co.*, 50 Conn. 364, 21 Atl. 1073; *Lehigh Val. R. Co. v. Greiner*, 113 Pa. 600, 6 Atl. 246; *Murphy v. Deane*, 101 Mass. 455, 3 Am. Rep. 390; *Central R. Co. v. Moore*, 24 N. J. Law, 824; *Monongahela City v. Fischer*, 111 Pa. 9, 2 Atl. 87, 56 Am. Rep. 241; *Lent v. Railroad Co.*, 120 N. Y. 467, 24 N. E. 653. The negligence of the plaintiff, if it be a proximate contributing cause of the injury, debars recovery, even if the defendant's negligence were greater than his own. *Ward v. Maine Cent. R. Co.*, 96 Me. 136, 51 Atl. 947; *Bolin v. Chicago, St. P., M. & O. R. Co.*, 108 Wis. 333, 84 N. W. 446, 81 Am. St. Rep. 911; *Richmond Traction Co v. Martin's Adm'x* [Va.] 45 S. E. 886. The doctrine of "comparative negligence," which for many years prevailed in Illinois, whereby, if the plaintiff's negligence were slight and that of the defendant gross, the plaintiff might recover, has been recently discarded in that state. *Lanark v. Dougherty*, 153 Ill. 163, 38 N. E. 892.)

## 2. Negligence of plaintiff remote.

(10 Mees. & W. 545.)

DAVIES v. MANN.

(Court of Exchequer. November 4, 1842.)

### 1. NEGLIGENCE—REMOTE AND PROXIMATE CAUSE OF INJURY.

In an action for injuries alleged to have been caused by defendant's negligence, the negligence of plaintiff which will preclude his recovery must be such as that he could, by ordinary care, have avoided the consequence of defendant's negligence.

### 2. SAME.

Plaintiff fettered the forefeet of his ass, and turned it into the highway to graze, and defendant's servant, negligently driving along the highway, ran over it. *Held*, that the court properly charged that, if the proximate cause of the injury was attributable to the want of proper care on the part of defendant's servant, the plaintiff could recover, though plaintiff's act in fettering the ass so that he could not get out of the way of carriages, and turning him in the highway, was illegal.

Motion for new trial.

Action by Davies against Mann to recover damages for the negligent killing of plaintiff's ass. On the trial there was evidence to show that plaintiff fettered the forefeet of the ass, and turned him into the highway to graze, and that defendant's wagon, with a team of three horses in charge of his servant, came down a slight descent at a rapid pace, and ran over the ass; that the road was eight yards wide; and that the driver was some little distance behind the horses. The court, Erskine, J., charged the jury that, though the act of the plaintiff, in having the ass on the highway, so fettered as to prevent his getting out of the way of carriages traveling along it, might be illegal, still, if the proximate cause of the injury was attributable to the want of proper conduct on the part of the driver of the wagon, the action was maintainable against the defendant, and, if they thought the accident might have been avoided by the exercise of ordinary care on the part of the driver, to find for plaintiff. The jury found for plaintiff, damages 40 s. Defendant moved for a new trial.

ABINGER, C. B. I am of opinion that there ought to be no rule in this case. The defendant has not denied that the ass was lawfully in the highway, and therefore we must assume it to have been lawfully there; but, even were it otherwise, it would have made no difference; for, as the defendant might, by proper care, have avoided injuring the animal, and did not, he is liable for the consequences of his negligence, though the animal may have been improperly there.

PARKE, B. This case was fully considered by this court in the case of *Bridge v. Railway Co.*, 3 Mees. & W. 246, where, it appears

to me, the correct rule is laid down concerning negligence, namely, that the negligence which is to preclude a plaintiff from recovering in an action of this nature must be such as that he could, by ordinary care, have avoided the consequence of the defendant's negligence. I am reported to have said in that case, and I believe quite correctly, that "the rule of law is laid down with perfect correctness in the case of *Butterfield v. Forrester*, 11 East, 60, that, although there may have been negligence on the part of the plaintiff, yet unless he might, by the exercise of ordinary care, have avoided the consequences of the defendant's negligence, he is entitled to recover; if by ordinary care he might have avoided them, he is the author of his own wrong." In that case of *Bridge v. Railway Co.* there was a plea imputing negligence on both sides; here it is otherwise, and the judge simply told the jury that the mere fact of negligence on the part of the plaintiff in leaving his donkey on the public highway was no answer to the action, unless the donkey's being there was the immediate cause of the injury; and that, if they were of opinion that it was caused by the fault of the defendant's servant in driving too fast, or, which is the same thing, at a smartish pace, the mere fact of putting the ass upon the road would not bar the plaintiff of his action. All that is perfectly correct; for although the ass may have been wrongfully there, still the defendant was bound to go along the road at such a pace as would be likely to prevent mischief. Were this not so, a man might justify the driving over goods left on a public highway, or even over a man lying asleep there, or the purposely running against a carriage going on the wrong side of the road.

GURNEY and ROLFE, BB., concurred.

Rule refused.

(This case was the starting point of a doctrine which has been thus expressed: "The plaintiff may recover, notwithstanding his own negligence exposed him to the risk of the injury of which he complains, if the defendant, after he became aware, or ought to have become aware, of the plaintiff's danger, failed to use ordinary care to avoid injuring him, and he was thereby injured." *Cincinnati, H. & D. R. Co. v. Kassen*, 49 Ohio St. 230, 31 N. E. 282, 16 L. R. A. 674; *Inland & S. B. Coasting Co. v. Tolson*, 139 U. S. 551, 71 Sup. Ct. 653, 35 L. Ed. 270; *Baltimore Traction Co. v. Appel*, 80 Md. 603, 31 Atl. 964; *Tucker's Adm'r v. Norfolk & W. R. Co.*, 92 Va. 549, 24 S. E. 229; *Ward v. Railroad Co.*, 96 Me. 136, 51 Atl. 947; *State v. Railroad*, 52 N. H. 528; *Menger v. Laur*, 55 N. J. Law, 205, 26 Atl. 180, 20 L. R. A. 61; *Prue v. New York, P. & B. R. Co.*, 18 R. I. 360, 27 Atl. 450; *Tully v. Philadelphia, W. & B. R. Co.*, 2 Pennewill, 537, 47 Atl. 1019, 82 Am. St. Rep. 425; *Memphis & C. R. Co. v. Martin*, 131 Ala. 269, 30 South. 827; *Smith v. Railroad*, 114 N. C. 728, 19 S. E. 863, 923, 25 L. R. A. 287. Hence a railroad company has been held liable for injury to a drunken man on the track [or a man asleep on the track], if the engineer discovered him, or by reasonable watchfulness might have discovered him, in time to avoid injuring him. *Baker v. Railroad*, 118 N. C. 1015, 24 S. E. 415. Some authorities, however, would expunge from the rule the words,

"or ought to have become aware." *Cullen v. Baltimore & P. R. Co.*, 8 App. D. C. 69. This question is much discussed in *Smith v. Railroad*, 114 N. C. 728, 19 S. E. 863, 923, 25 L. R. A. 287.

In cases under this doctrine, wherein the plaintiff is allowed to recover, his negligence is deemed the remote, and that of the defendant the proximate, cause of the injury. But when the negligence of each is a concurrent proximate cause, there can be no recovery. Whether plaintiff's negligence is a proximate or remote cause is at times a difficult question to determine. *Rider v. Syracuse Rapid Transit R. Co.*, 171 N. Y. 139, 63 N. E. 836, 58 L. R. A. 125.)

### 3. Contributory negligence of children *sui juris*.

(39 Minn. 164, 39 N. W. 402, 12 Am. St. Rep. 626.)

TWIST v. WINONA & ST. P. R. CO.

(Supreme Court of Minnesota. August 30, 1888.)

#### 1. NEGLIGENCE—CONTRIBUTORY—CHILDREN.

A child of such tender years as to be incapable of exercising any judgment or discretion cannot be charged with contributory negligence. But where a child has attained such an age as to be capable of exercising his judgment and discretion, he is responsible for the exercise of such a degree of care and vigilance as might reasonably be expected of one of his age and mental capacity.

#### 2. SAME—PLAYING ABOUT RAILROAD TURN-TABLE.

A boy of the age of nearly 10½ years, and of average intelligence, who had been frequently in the vicinity of a railway turn-table, and had a general knowledge of its structure and operation, and had been repeatedly warned by his father that it was dangerous to play upon it, and told not to do so, and knew that the railway company prohibited children from playing on the table, and also knew that he had no right to play upon it, and that it was dangerous to do so, engaged with other boys in swinging upon it while in motion, and was injured by his foot being caught between the arm of the table and the stationary abutments. *Held*, that the conduct of the boy amounted to contributory negligence, although he might not have been of sufficient age and discretion to understand and comprehend the full extent of the danger to which his conduct exposed him.

Appeal from District Court, Nicollet County; Webber, Judge.

Action by Frank Twist against the Winona & St. Peter Railroad Company to recover damages for injuries sustained by plaintiff's minor child, Verne Twist, while upon defendant's turn-table. Verdict for plaintiff for \$5,000. A motion by defendant for judgment on the special findings or for a new trial was overruled, and it appealed.

MITCHELL, J. This action was brought to recover damages for personal injuries sustained by plaintiff's son while playing on one of defendant's turn-tables. The table was situated upon defendant's

own premises, in the suburbs of St. Peter, some five or six hundred feet from the depot. The premises were uninclosed, but the table was not so near any highway or street as to interfere with the safety or convenience of public travel. It was what is called a "skeleton" turn-table, of the kind in general use by railways except in round-houses. In accordance with the general usage, it was not locked, but was supplied with latches of the usual kind to keep it in place when in use. These latches weighed four or five pounds each, but could be lifted out of their sockets, and the table set in motion, by comparatively small children. Boys had been frequently in the habit of setting the table in motion, and playing on it, and during the 15 or 20 years it had been there three boys had been injured by it, all of which facts were known to the defendant. The agents of the railway company had frequently forbidden children from playing on the table, and were in the habit of driving them away when they saw them doing so. It does not appear but that some way might be devised of keeping such turn-tables locked when not in use, but the evidence does show that no such contrivance has yet been devised, and that the general custom is to leave them unlocked and merely held in place by latches, as this one was. Plaintiff's son, a boy of the age of 10 years and 4 months, went, in company with several other boys, into the vicinity of the table, and, after the others had set the table in motion, he also joined in swinging on it, and sustained the injuries complained of, in the usual way, by his foot being caught between the arms of the table and the stationary abutments. The negligence charged against the defendant is in not locking the table, so that it could not be set in motion by children.

The rule invoked by plaintiff is that laid down by this court in *Keffe v. Railroad Co.*, 21 Minn. 207, 18 Am. Rep. 393, and by the supreme court of the United States in what may be termed the pioneer "turn-table case," (*Railroad Co. v. Stout*, 17 Wall. 657, 21 L. Ed. 745) in which it is held that the owner of dangerous machinery, who leaves it in an open place, though on his own land, where he has reason to believe that young children will be attracted to play with it, and be injured, is bound to use reasonable care to protect such children from the danger to which they are thus exposed. The line of argument adopted in the *Keffe Case*, in support of this rule, is that such machinery, being attractive to young children, presents to them a strong temptation to play with it, and thus allures them into a danger whose nature and extent they, being without judgment and discretion, can neither apprehend nor appreciate, and against which they cannot protect themselves; that such children may be said to be induced by the owner's own conduct to come upon the premises; that what an express invitation is to an adult, an attractive plaything is to a child of tender years; that as to them such machinery is a hidden danger,—a trap. Much of the briefs of counsel, especially of

that of defendant, is devoted to the consideration of the doctrine of these so-called "turn-table cases," and of the question of the duty, if any, which the owner of dangerous machinery or other articles situate on his own premises owes to intermeddling or trespassing children. The doctrine of these cases has been questioned by some courts, and repudiated by others, who hold that a land-owner is not bound to take active measures to insure the safety of intruders, even children, nor is he liable for any injury resulting from the lawful use of his premises to one entering without right; that to intruders or trespassers the land-owner owes no duty; and where there is no duty to perform there can be no negligence. *Frost v. Railroad Co.*, 64 N. H. 220, 9 Atl. 790, 10 Am. St. Rep. 396. Applied to one of sufficient mental capacity to be a conscious trespasser, this is undoubtedly a sound rule; but if applied to children of tender years, strictly non sui juris, it would seem harsh and inhuman. Properly qualified and limited in its application, the doctrine of the *Keffe Case* is, in our judgment, in accordance with both reason and the dictates of humanity. But some of the cases have undoubtedly gone too far. By adopting an extreme or extraordinary standard of duty on the part of the land-owner on the one side, and on the other side by attributing the conduct of all children to their childish instincts so as to exempt them from the charge of contributory negligence, regardless of age or mental capacity, it is obvious that the rule of the *Keffe* and similar cases is capable of indefinite and unbounded applicability. To the irrepressible spirit of curiosity and intermeddling of the average boy there is no limit to the objects which can be made attractive playthings. In the exercise of his youthful ingenuity, he can make a plaything out of almost anything, and then so use it as to expose himself to danger. If all this is to be charged to natural childish instincts, and the owners of property are to be required to anticipate and guard against it, the result would be that it would be unsafe for a man to own property, and the duty of the protection of children would be charged upon every member of the community except the parents of the children themselves. This court itself, if it has not modified the *Keffe Case*, has at least indicated that the doctrine which it announces is not to be given any such extreme and unlimited application. *Kolsti v. Railroad Co.*, 32 Minn. 133, 19 N. W. 655; *Emerson v. Peteler*, 35 Minn. 481, 29 N. W. 311, 59 Am. Rep. 337. It is unnecessary, however, to determine whether, upon the facts in the present case, the finding of negligence on the part of the defendant can be sustained, inasmuch as it is clearly established by both the evidence and the special findings of fact that the boy himself was guilty of contributory negligence. The law very properly holds that a child of such tender years as to be incapable of exercising judgment and discretion cannot be charged with contributory negligence; but this principle cannot be applied as a rule of law to all children, without

regard to their age or mental capacity. Children may be liable for their torts or punished for their crimes, and they may be guilty of negligence as well as adults. The law very humanely does not require the same degree of care on the part of a child as of a person of mature years, but he is responsible for the exercise of such care and vigilance as may reasonably be expected of one of his age and capacity; and the want of that degree of care is negligence. The fact that he may not have the mature judgment of an adult will not excuse a child from exercising the degree of judgment and discretion which he possesses, or for disregarding the warnings and orders of his seniors, and heedlessly rushing into known danger. In the *Stout Case*, the defendant made an express disclaimer of any contributory negligence on the part of the plaintiff. In the *Keffe Case*, which was disposed of on the pleadings, this court said: "It was not urged upon the argument that plaintiff was guilty of contributory negligence, and we have assumed that he exercised, as he was bound to do, such reasonable care as a child of his age and understanding was capable of using." And as was remarked in the *Keffe Case*, in the cases cited in support of these "turn-table cases," the principal question discussed is not whether the defendant owed the plaintiff the duty of care, but whether the defendant was absolved from liability for breach of duty by reason of the fact that the plaintiff was a trespasser, who by his own act contributed to the injury; and the distinction is not sharply drawn between the effect of plaintiff's trespass as a bar to his right to require care, and the plaintiff's contributory negligence as a bar to his right to recover for the defendant's failure to exercise such care as it was his duty to use. But the authorities are all one way, and to the effect that even a child is bound to use such reasonable care as one of his age and mental capacity is capable of using; and his failure to do so is negligence. *Wendell v. Railroad Co.*, 91 N. Y. 420; *Messenger v. Dennie*, 141 Mass. 335, 5 N. E. 283; *Railway Co. v. Eininger*, 114 Ill. 79, 29 N. E. 196; *Brown v. Railroad Co.*, 58 Me. 384; *Achtenhagen v. City of Watertown*, 18 Wis. 331, 84 Am. Dec. 769; *Masser v. Railroad Co.*, 68 Iowa, 602, 27 N. W. 776; *Murray v. Railroad Co.*, 93 N. C. 92; *Ludwig v. Pillsbury*, 35 Minn. 256, 28 N. W. 505; *Railroad Co. v. Gladmon*, 15 Wall. 401, 21 L. Ed. 114; *Gillespie v. McGowan*, 100 Pa. 144, 45 Am. Rep. 365.

The evidence in the present case shows without conflict substantially the following facts: The boy was nearly 10½ years old, and of at least average intelligence. He had been at school since he was 6 or 7 years old. His father was a railroad man, in the employment of the defendant around the yard and depot, and the boy had been frequently around the railroad grounds and the turn-table with his father. He was evidently familiar, at least in a general way, with the working of the turn-table, and the use of the latches. His

father had repeatedly warned him against going on the turn-table, and told him of the danger, and that he must not go on it. He evidently had quite a lively sense of the danger of playing on the table, and of the manner in which accidents were liable to occur to those swinging on it. The boy himself admits that he knew there was great danger of getting hurt on it. He knew that playing on it was forbidden by the railroad company, and that if its agents saw children doing so they would drive them off. It is suggested that his motive in going to the table was to try to induce the other boys to get off lest they might get hurt. But if he had such a realizing sense of their danger, so much the more inexcusable was it for him to go and do precisely what he knew was exposing them to danger. Upon this state of the evidence the jury, in addition to their general verdict, found the following facts in answer to the following questions submitted to them: "First. Did Verne Twist, when he went to play on this turn-table, on the day when he was hurt, know that it was dangerous? Answer. Yes. Second. Did Verne Twist, when he went to play on this turn-table, on the day when he was hurt, know that he had no right to go there, and that it was dangerous to play on the turn-table? A. Yes. Third. Was Verne Twist, when he went to play on this turn-table, on the day when he was hurt, of sufficient age and discretion to understand and comprehend the danger he subjected himself to? A. No." These special findings must, if possible, be so construed as to be consistent with each other, and also supportable by the evidence. If the third finding means that the boy was of such tender years as to be incapable of exercising any judgment and discretion, or of understanding that his acts exposed him to danger, it would be inconsistent with the other findings, and wholly unsupported by the evidence. In the light of the testimony, and taken in connection with the previous findings, all that it can mean is that while the boy knew that he had no right to play on the turn-table, and that it was dangerous to do so, yet he did not fully understand or appreciate the extent of the danger in all its possibilities. But this may be said of almost every case of contributory negligence, even on the part of adults. No one voluntarily and unnecessarily enters a danger which he knows to exist without expecting to escape it. In all cases of conscious self-exposure there is a failure to realize the extent or degree of the risk, but the act is none the less contributory negligence, if the party fails to exercise ordinary care. In the present case, while the boy did not realize the extent of the danger as fully as would an adult, yet he knew that he had no right to go upon the turn-table; that his father had warned him that it was dangerous, and he himself knew that it was dangerous. Yet he goes, a conscious trespasser, and does the forbidden and dangerous act. While we are not disposed to adopt a severe rule by which to judge the conduct of childhood, yet such conduct on the part of an intelligent boy

of nearly 10½ years amounts to contributory negligence, and cannot be excused on the plea of childish instincts. We are of opinion that upon the special findings the defendant was entitled to judgment.

The cause is remanded, with directions to the district court to enter judgment for defendant.

(As to the rule that a child old enough to be capable of negligence is only held to the exercise of such a degree of care as may be reasonably expected from a person of his years, intelligence, capacity, and maturity, see also *Thurber v. Harlem Bridge, M. & F. R. Co.*, 60 N. Y. 326; *Zwack v. New York, L. E. & W. R. Co.*, 160 N. Y. 362, 54 N. E. 785; *Rachmel v. Clark*, 205 Pa. 314, 54 Atl. 1027, 62 L. R. A. 959; *Consolidated Traction Co. v. Scott*, 58 N. J. Law, 682, 34 Atl. 1094, 33 L. R. A. 122, 55 Am. St. Rep. 620; *City of Pekin v. McMahon*, 154 Ill. 141, 39 N. E. 484, 27 L. R. A. 206, 45 Am. St. Rep. 141; *Collins v. South Boston R. Co.*, 142 Mass. 301, 7 N. E. 856, 56 Am. Rep. 675; *Baltimore City R. Co. v. McDonnell*, 43 Md. 534; *Cleveland Rolling Mill Co. v. Corrigan*, 46 Ohio St. 283, 20 N. E. 466, 3 L. R. A. 385.

The doctrine of the so-called "turntable cases," or "attractive object" cases, has, in recent years, been rejected in a number of the states. *Frost v. Railroad Co.*, 64 N. H. 220, 9 Atl. 790, 10 Am. St. Rep. 396; *Daniels v. New York & N. E. R. Co.*, 154 Mass. 349, 28 N. E. 283, 13 L. R. A. 248, 26 Am. St. Rep. 253; *Walsh v. Fitchburg R. Co.*, 145 N. Y. 301, 39 N. E. 1068, 27 L. R. A. 724, 45 Am. St. Rep. 615; *Delaware, L. & W. R. Co. v. Reich*, 61 N. J. Law, 635, 40 Atl. 682, 41 L. R. A. 831, 68 Am. St. Rep. 727; *Paolino v. McKendall* [R. I.] 53 Atl. 268, 60 L. R. A. 133; *Uthermohlen v. Boggs Run Co.*, 50 W. Va. 457, 40 S. E. 410, 55 L. R. A. 911, 88 Am. St. Rep. 884; *Ryan v. Tower*, 128 Mich. 463, 87 N. W. 644, 55 L. R. A. 310, 92 Am. St. Rep. 481; *Savannah, F. & W. Ry. Co. v. Beavers*, 113 Ga. 398, 39 S. E. 82, 54 L. R. A. 314; cf. *Barney v. Hannibal & St. J. R. Co.*, 126 Mo. 372, 28 S. W. 1069, 26 L. R. A. 847. "An invitation to a child," it is said, "will not be implied from the fact that a turntable, obviously designed for another purpose, furnishes a place for play which is attractive to children." *Turess v. New York, S. & W. R. Co.*, 61 N. J. Law, 314, 40 Atl. 614. In fact, children going on others' premises under such circumstances have been held trespassers, and for that reason debarred from recovery, even though they were not old enough to be chargeable with negligence. *Buch v. Amory Mfg. Co.*, 69 N. H. 257, 44 Atl. 809, 76 Am. St. Rep. 163, and cases supra; *Rodgers v. Lees*, 140 Pa. 475, 21 Atl. 399, 12 L. R. A. 216, 23 Am. St. Rep. 250. On the other hand, the "turntable cases" have been sustained by the United States Supreme Court, and in many of the states, and various other attractions which entice children on the lands of others, as ponds, swimming pools, machinery, lumber piles, etc., have been held to come within the same principle. *Union Pac. Ry. Co. v. McDonald*, 152 U. S. 262, 14 Sup. Ct. 619, 38 L. Ed. 434; *City of Pekin v. McMahon*, 154 Ill. 141, 39 N. E. 484, 27 L. R. A. 206, 45 Am. St. Rep. 114; *Edgington v. Burlington, C. R. & N. R. Co.*, 116 Iowa, 410, 90 N. W. 95, 57 L. R. A. 561 [reviewing the cases on both sides of the question]; *Price v. Water Co.*, 58 Kan. 551, 50 Pac. 450, 62 Am. St. Rep. 625; *Bramson's Adm'r v. Labrot*, 81 Ky. 638, 50 Am. Rep. 193; *Alabama G. S. R. Co. v. Crocker*, 131 Ala. 534, 31 South. 561; *Barrett v. Railroad Co.*, 91 Cal. 296, 27 Pac. 666, 25 Am. St. Rep. 186; *Stendal v. Boyd*, 67 Minn. 279, 69 N. W. 899.)

#### 4. Imputation of negligence to children non sui juris.— Different theories.

##### — A. The rule that a parent's negligence will be imputed to his child.

(38 N. Y. 455, 98 Am. Dec. 66.)

MANGAM v. BROOKLYN CITY R. CO. (in part).

(Court of Appeals of New York. September Term, 1868.)

##### 1. NEGLIGENCE OF PARENT IMPUTABLE TO CHILD.

An infant of tender years is non sui juris. His custody is confided by law to his parents (or those standing in loco parentis); and, as the child has not the discretion necessary for personal protection, the parent is held in law to exercise it for him, and, in cases of personal injuries received from the negligence of others, the law imputes to the infant the negligence of the parents.

##### 2. EVIDENCE OF PARENT'S NEGLIGENCE.

The escape of a child three or four years old, without its parent's knowledge, into the street, through an open window coming to within four feet of the floor, the doors being locked, is not conclusive evidence of the parent's negligence; and, if the child be injured in the street by the negligence of defendant and brings action to recover damages, a nonsuit, on the ground that the parent was guilty of negligence as matter of law, is improper.

Action to recover for an injury sustained by being struck by a car on defendant's road in Brooklyn. The plaintiff lived with his father in Brooklyn; about twenty minutes before the injury, he was upon a balcony at the rear of the house; there was no opportunity to get from the rear into the street; he was at this time seen by his sister, who went with another woman into the yard to hang out clothes; the only mode by which he could get into the street was from the front part of the house; the front doors were closed and locked; there was a window in the front, coming to within about four feet of the floor, which was raised from the bottom; this was the only mode of egress. The plaintiff, after getting out of the house, passed down North Tenth street, toward First street; the car in question was running along First street, toward Tenth; at the junction, the plaintiff crossed the track of the road in front of the mules drawing the car; he got out of the way of the mules, but was struck by the dash-board of the car and knocked down, and received the injury. The driver of the car had caught a pigeon, which he had in his hands and was sitting down looking at it, having wound his lines around the brake, and was paying no attention to his team, or to what might be on the track. A nonsuit was set aside.

GROVER, J. The nonsuit granted at the Circuit can only be sustained upon the ground that the evidence failed to show that the

injury received by the plaintiff resulted from the negligence of the driver of the car, or that it showed the negligence of the plaintiff, or that of those having the care of him, and whose negligence was imputable to him, contributed to the injury received. Upon the first ground, no question is made by the counsel of the appellant. The negligence of the driver was clearly proved. It was his duty, while driving in the streets of Brooklyn, to keep entire control of his team as far as practicable; to be in a position to speedily apply the brake; and to be vigilant in observing the track, so as to enable him, as far as practicable, to avoid inflicting injury upon others. All of this was omitted by the driver, upon the occasion in question. Upon the latter ground there is more doubt. In *Hartfield v. Roper*, 21 Wend. 615, 34 Am. Dec. 273, it was held, that when a child of such tender years as to be incapable of avoiding danger was permitted by his parents or guardians to be in the public streets, and then received an injury by being run over by a traveler who failed to discover him while standing or sitting in the traveled track, they could not recover unless the traveler was guilty of gross negligence, or inflicted the injury voluntarily. The principle of this case has been since its determination often applied by the courts of this State to analogous cases, and must now be regarded as the settled law, notwithstanding a somewhat different rule prevails in some of the other States. See *Daley v. Norwich R. Co.*, 26 Conn. 591, 68 Am. Dec. 413, and cases cited. This brings us to an inquiry as to the degree of care required from parents and guardians in keeping such a child from the street. The counsel for the defendant insists that it must be such care as effectually to accomplish the object, and that any thing short of this is negligence. While on the other hand it is claimed by the plaintiff that to constitute negligence in the parent or guardians there must be an omission of such care as persons of ordinary prudence exercise and deem adequate for that purpose. The latter appears to be the conclusion required by the analogies of the law. Legal negligence is the omission of such care as persons of ordinary prudence exercise and deem adequate to the circumstances of the case. This definition applied to the point in consideration will exonerate the parents from the charge of negligence, if they used that degree of care. This conclusion is also supported by the reasoning in *Hartfield v. Roper*, *supra*. It is there said that the law has placed infants in the hands of vigilant and generally affectionate keepers, their own parents, and if there be any legal responsibility for damages, it lies on them. Surely an infant could not recover against his parent or guardian for negligence in permitting him to escape into the street, unless he could show some omission of ordinary care to prevent it. The inquiry upon this point then is, whether the parents of the plaintiff were guilty of negligence in permitting him to get into the street; for if not, the nonsuit cannot be sustained upon that ground. The evidence shows

that he was not permitted to go unattended in the street; that he was lost sight of by his sister for only about twenty minutes; that his only means of access to the street was by climbing out of an open window, which only came within four feet of the floor. There was no evidence that he had ever before got out of this window, or attempted to. I do not think that failing to guard this aperture will warrant the conclusion as matter of law, that the parent was guilty of negligence. At most it should only have been submitted to the jury as a question of fact. The only remaining question is, whether the plaintiff himself was guilty of negligence contributing to the injury. After getting into the street, he ran along Tenth until he came to First, and then ran across the track ahead of the team, getting out of their way, but not out of the way of the dash-board of the car. He was too young to possess discretion to guard against that danger, and his not doing so is not, under the circumstances, to be regarded as negligence in him.

The order appealed from must be affirmed, and judgment final, upon the stipulation, be given to the plaintiff.

MASON, J. In law some persons are independent, and some are subject to another, or as it is expressed in the civil law, "*quaedam personæ sui juris sunt, quaedam alicui juri subjectæ.*" This rule applies to infants in their relations to society, who are of such tender age that they are incapable of self-control and personal protection. An infant in its first years is not *sui juris*. It belongs to another, to whom discretion in the care of its person is exclusively confided. The custody of the infant of tender years is confided by law to its parents, or those standing in *loco parentis*, and not having that discretion necessary for personal protection, the parent is held in law to exercise it for him, and in cases of personal injuries received from the negligence of others, the law imputes to the infant the negligence of the parents. The infant being *non sui juris*, and having a keeper in law to whose discretion, in the care of his person, he is confided, his acts, as regards third persons, must be held in law the act of the infant; his negligence, the negligence of the infant. The law has not fixed the age at which the infant shall be deemed in law *non sui juris*, although it may be safely assumed in law, that an infant of the age of three years and seven months is not *sui juris*. In the case of *Hartfield v. Roper*, 21 Wend. 615, 34 Am. Dec. 273, it was held, that an infant of the age of two years was not *sui juris*, while in the case of *McMahon v. Mayor, etc.*, of New York, 33 N. Y. 642, it was held that an intelligent boy of the age of eleven years was *sui juris*. The case of *Honesberger v. Second Ave. R. Co.*, 33 How. 195, where the infant was a sprightly boy, of the age of six or seven years, the case was regarded so near the border line, that it was held proper to submit the case to the jury, to decide whether the infant was

sui juris or not. If there were any doubt as to this child being of the age and capacity that in law he should be held sui juris, it certainly should have been left to the jury to say by their verdict whether he was so or not. I apprehend, however, that it is not to be doubted, in a case like the present, that an infant of three or four years of age is not to be deemed sui juris, but to be deemed in law as in the keeping of his parents, or other lawful custodians. The rule is well settled by the adjudications in this State, that such an infant who is non sui juris, is incapable of forfeiting its remedy against a conceded wrong-doer, by his personal negligence, and it is for this very reason that it is constructively chargeable with the negligence of its legal custodian.

As this child had not by any personal wrong of its own forfeited its right of action for this injury, the defense in this case must be predicated upon constructive negligence, or upon imputing to the plaintiff and charging him with the negligence of his mother. This is a good defense in law, if it is made out, and the only question is, whether upon the evidence in the case, this defense is so clearly manifest, that the judge was justified in taking the case from the jury. I do not think it was, and consequently the General Term were right in granting a new trial. It was to say the least a fair question for the jury upon the evidence, whether the imputation of negligence can be attributed to the mother, in the escape of this child from the house into the street, where it was injured, and if she was not guilty of negligence in this particular, then the plaintiff was clearly entitled to recover, for the defendant's driver was certainly guilty of negligence in running over the plaintiff. There can be no doubt, that had he been giving ordinary attention to his duties this injury would never have occurred; and I cannot but think it was a grossly negligent act in this driver to wind his lines around the brake, and trust to the mules entirely to govern themselves in the streets of this populous city, and giving his exclusive attention to the bird he had caught, and not to his team. An infant of even this tender age is not an outlaw in the street, where all persons may be grossly negligent in regard to his person; and where he escapes from the house of his keepers without any fault or negligence of those having the custody of him, then the rule of law, that it is a defense to those who have negligently injured him, to show that his personal negligence concurred in producing the injury, does not apply.

The child being non sui juris, cannot personally be held to any rule of conduct in regard to such negligence. He is incapable in law of doing any act that will deprive him of his action for injuries negligently inflicted upon him by others. His parent or other custodian cannot be chargeable with negligence for his conduct in the street, where the child has escaped from the house without their knowledge or neg-

ligence. Any other rule would be unjust and unreasonable, as affording no protection to helpless infants against injuries from the negligent and careless conduct of others. In short, it would make them little less than outlaws in the street, unless attended by their parents or other lawful custodians. They are not beyond the pale of the law when in the streets. Common humanity is alive to their protection, and the law, both in reason and justice, and out of compassion to their weakness and inability to protect themselves, should throw a broader shield of protection around them against injuries from the careless conduct of the strong, than it affords to an adult, who is capable of self-defense and protection.

There is no reason, propriety or justice in the rule which would give no more protection to the one than to the other. The law in this class of cases is not subject to such a reproach. It says, the infant of three and a half years cannot be expected to exercise discretion and govern himself cautiously as regards danger, and consequently he shall be held in law non sui juris, and none who have negligently and carelessly injured him should be permitted to say he was personally negligent, and thereby contributed to the injury. The law very wisely says: At the same time, his keeper or custodian must not be guilty of any negligence in allowing him to be exposed to the danger; if he does, his custodian's negligence shall be imputed to him.

Applying these principles to this case, the judge at Circuit was not justified in nonsuiting the plaintiff, and the General Term were right in granting a new trial, and the order should be affirmed, and judgment given for the plaintiff.

Judgment affirmed.

(This doctrine is supported in a number of the states. *O'Brien v. McGlinchy*, 68 Me. 552; *Wright v. Malden & M. R. Co.*, 4 Allen, 283; *Casey v. Smith*, 152 Mass. 294, 25 N. E. 734, 9 L. R. A. 259, 23 Am. St. Rep. 842; *McMahon v. Northern Cent. Ry. Co.*, 39 Md. 439; *Fitzgerald v. Railroad Co.*, 29 Minn. 336, 13 N. W. 168, 43 Am. Rep. 212; *Weil v. Dry Dock. E. B. & B. R. Co.*, 119 N. Y. 147, 23 N. E. 487; *Neun v. Rochester R. Co.*, 165 N. Y. 146, 58 N. E. 876.)

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(63 N. Y. 104, 20 Am. Rep. 510.)

McGARRY v. LOOMIS et al. (in part).

(Court of Appeals of New York. November 9, 1875.)

# 1. IMPUTATION OF PARENTS' NEGLIGENCE TO CHILD—EFFECT OF CHILD'S CONDUCT.

Though the negligence of parents in exposing a child non sui juris to danger may be imputed to the child, still, if the child has not committed or omitted an act which would constitute negligence in a person of years of discretion, an injury by the negligence of another cannot be defended

upon the alleged negligence of the parents. If the child is in a lawful place and exercising what would be deemed ordinary care in an adult, it may recover for an injury by another's negligence, irrespective of the conduct of the parents. Under such circumstances, the conduct of the parents is too remote.

2. SAME.

Where a child four years old was on the sidewalk, and was injured by steam negligently conducted from defendants' mill under the sidewalk, while exercising what would be regarded as ordinary care in an adult, the question of the negligence of its parents is immaterial in determining its right to recover for the injury.

This action was brought to recover damages for injuries to plaintiff, alleged to have been occasioned by defendants' negligence. Defendants were carrying on a planing mill in the city of Brooklyn. They used a steam engine, from which waste hot water and steam were conducted by a pipe under the sidewalk to a hole inside the curbstone, which contained hot water and steam coming from the pipe. Plaintiff, a child a little over four years of age, who lived with his parents on the street, went out upon the sidewalk, fell into the hole, and was severely scalded.

From a judgment of the General Term of the Supreme Court affirming a judgment in favor of plaintiff entered upon a verdict, and affirming an order denying a motion for a new trial, defendant appeals. Affirmed.

CHURCH, C. J. The question of the defendants' negligence in carrying a steam pipe from their factory under the sidewalk, and discharging the same so as to cause a pool of hot water on and adjacent to the walk, in which the plaintiff was found injured, was properly submitted to the jury, and no exception was taken to the charge on that subject. The defendants' counsel requested the court to charge, that if the child had not sufficient discretion to see the danger from the hot water by reason of its tender age, then it was negligence on the part of the parents to allow the child to be at this place unattended by a sufficient attendant to protect it from danger. The plaintiff was about four years of age, and according to the authorities, must be regarded as non sui juris. *Hartfield v. Roper*, 21 Wend. 615, 34 Am. Dec. 273; *Mangam v. Brooklyn R. Co.*, 38 N. Y. 455, 461, 98 Am. Dec. 66; *Ihl v. Forty-second St. R. Co.*, 47 N. Y. 317, 7 Am. Rep. 450. The request was properly overruled. It does not claim that it was negligence per se to allow a child four years old to be on the sidewalk, and if it did, such a claim could not be maintained as matter of law; but it seeks to predicate negligence of the parents on the inability of the child to discover the danger from the hot water. If the latter was caused by the negligence of the defendants, as the jury have found, it constituted an obstruction to free passage upon the sidewalk, which the parents were not required to anticipate or guard

against. If the child was in a lawful place, the parents were not negligent in omitting to protect it against the wrongful act of the defendants. But the negligence of the parents in this case was not a question. The case was submitted to the jury upon the negligence of the child, and the jury were instructed that if the latter was negligent in getting into the water, he could not recover. If a child, though non sui juris, has not committed or omitted an act which would constitute contributory negligence in a person of years of discretion, an injury by the negligence of another cannot be defended upon the alleged negligence of the parents. 47 N. Y. 317, 7 Am. Rep. 450, supra. The child being in a lawful place, and exercising what would be regarded as ordinary care in an adult, is entitled to recover for an injury occasioned by the wrongful act of another, irrespective of the conduct of the parents. It is in cases where the child has done or omitted something which would be regarded in an adult as negligent, that the conduct of the parents, in respect to the degree of care exercised over the child, becomes material, and the reason is that negligence cannot be imputed to the child except through the parents; but when the child has done no negligent act, the conduct of the parents may be regarded as too remote. *Hartfield v. Roper*, 21 Wend. 615, 34 Am. Dec. 273, was an instance where the negligence of the parents was material, because the child was injured while sitting in the traveled track of a public highway. Here, as we have seen, the child was in a lawful place, and the question of its negligence was deemed necessary by the court to its recovery. If an act could have been imputed to the child, which in an older person might have constituted negligence, a recovery could still have been had if the parents had been free from negligence, but the latter alternative was not reached and not considered, which was a benefit rather than an injury to the defendants.

The judgment must be affirmed, with costs. All concur.

Judgment affirmed.

(This qualification of the *Hartfield v. Roper* rule is also sustained by *Kunz v. City of Troy*, 104 N. Y. 344, 351, 10 N. E. 442, 58 Am. Rep. 508; *O'Brien v. McGlinchy*, 68 Me. 552; *Lynch v. Smith*, 104 Mass. 52, 6 Am. Rep. 188.)

— **B. The rule that a parent's negligence will not be imputed to his child.**

(52 N. J. Law, 446, 19 Atl. 1102, 8 L. R. A. 842.)

**NEWMAN v. PHILLIPSBURG HORSE-CAR R. CO.**

(Supreme Court of New Jersey. June 5, 1890.)

**1. NEGLIGENCE—INJURIES TO CHILD—IMPUTED NEGLIGENCE.**

An infant of tender years is not to be charged with the negligence of its parent or the person having it in charge.

**2. SAME—STREET RAILROADS.**

The plaintiff, about two years of age, being under the care of her adult sister, wandered onto the track of a horse railroad, and was there run over by the carelessness of the driver of a car. *Held*, that plaintiff's right of action against the horse-car company was not lost, even if the sister's carelessness of supervision was, in part, the cause of her injury.

Case Certified from Circuit Court, Warren County.

The plaintiff was a child 2 years of age. She was in the custody of her sister, who was 22. The former, being left by herself for a few minutes, got upon the railroad track of the defendant, and was hurt by the car. The occurrence took place in a public street of the village of Phillipsburgh. The carelessness of the defendant was manifest, as at the time of the accident there was no one in charge of the horse drawing the car, the driver being in the car collecting fares. The circuit judge submitted the three following propositions to this court for its advisory opinion, viz.: "First, whether the negligence of the persons in charge of the plaintiff, an infant minor, should be imputed to the said plaintiff; second, whether the conduct of the persons in charge of the plaintiff at the time of the injury complained of was not so demonstrably negligent that the said circuit court should have nonsuited the plaintiff, or that the court should have directed the jury to find for the defendant; third, whether a new trial ought not to be granted on the ground that the damages awarded are excessive."

Argued November term, 1889.

**BEASLEY, C. J.** There is but a single question presented by this case, and that question plainly stands among the vexed questions of the law. The problem is whether an infant of tender years can be vicariously negligent, so as to deprive itself of a remedy that it would otherwise be entitled to. In some of the American states this question has been answered by the courts in the affirmative, and in others in the negative. To the former of these classes belongs the decision in *Hartfield v. Roper*, reported in 21 Wend. 615, 34 Am. Dec. 273. This case appears to have been one of first impression on this subject; and it is to be regarded not only as the precursor, but as the parent, of all the cases of the same strain that have since appeared. The inquiry with respect to

the effect of the negligence of the custodian of the infant, too young to be intelligent of situations and circumstances, was directly presented for decision in the primary case thus referred to; for the facts were these, viz.: The plaintiff, a child of about two years of age, was standing or sitting in the snow in a public road, and in that situation was run over by a sleigh driven by the defendants. The opinion of the court was that, as the child was permitted by its custodian to wander into a position of such danger, it was without remedy for the hurts thus received, unless they were voluntarily inflicted, or were the product of gross carelessness on the part of the defendants. It is obvious that the judicial theory was that the infant was, through the medium of its custodian, the doer, in part, of its own misfortune, and that consequently, by force of the well-known rule under such conditions, he had no right to an action. This, of course, was visiting the child for the neglect of the custodian; and such infliction is justified in the case cited in this wise: "The infant," says the court, "is not *sui juris*. He belongs to another, to whom discretion in the care of his person is exclusively confided. That person is keeper and agent for this purpose; in respect to third persons, his act must be deemed that of the infant; his neglect, the infant's neglect." It will be observed that the entire content of this quotation is the statement of a single fact, and a deduction from it; the premise being that the child must be in the care and charge of an adult, and the inference being that for that reason the neglects of the adult are the neglects of the infant. But surely this is conspicuously a non sequitur. How does the custody of the infant justify or lead to the imputation of another's fault to him? The law, natural and civil, puts the infant under the care of the adult; but how can this right to care for and protect be construed into a right to waive or forfeit any of the legal rights of the infant? The capacity to make such waiver or forfeiture is not a necessary or even convenient incident of this office of the adult, but on the contrary is quite inconsistent with it; for the power to protect is the opposite of the power to harm, either by act or omission. In this case, in 21 Wend. 615, 34 Am. Dec. 273, it is evident that the rule of law enunciated by it is founded in the theory that the custodian of the infant is the agent of the infant. But this is a mere assumption, without legal basis; for such custodian is the agent, not of the infant, but of the law. If such supposed agency existed, it would embrace many interests of the infant, and could not be confined to the single instance where an injury is inflicted by the co-operative tort of the guardian. And yet it seems certain that such custodian cannot surrender or impair a single right of any kind that is vested in the child, nor impose any legal burden upon it. If a mother, traveling with her child in her arms, should agree with a railway company that, in case of an accident to such infant by reason of the joint negligence of herself and the company, the latter should not be lia-

ble to a suit by the child, such an engagement would be plainly invalid on two grounds: First, the contract would be *contra bonos mores*; and, second, because the mother was not the agent of the child, authorized to enter into the agreement. Nevertheless the position has been deemed defensible, that the same evil consequences to the infant will follow from the negligence of the mother, in the absence of such supposed contract, as would have resulted if such contract should have been made, and should have been held valid.

In fact, this doctrine of the imputability of the misfeasance of the keeper of a child to the child itself is deemed to be a pure interpolation into the law; for, until the case under criticism, it was absolutely unknown, nor is it sustained by legal analogies. Infants have always been the particular objects of the favor and protection of the law. In the language of an ancient authority, this doctrine is thus expressed: "The common principle is that an infant, in all things which sound in his benefit, shall have favor and preferment in law as well as another man, but shall not be prejudiced by anything to his disadvantage." 9 Vin. Abr. 374. And it would appear to be plain that nothing could be more to the prejudice of an infant than to convert, by construction of law, the connection between himself and his custodian into an agency to which the harsh rule of *respondeat superior* should be applicable. The answerableness of the principal for the authorized acts of his agent is not so much the dictate of natural justice as of public policy, and has arisen, with some propriety, from the circumstances that the creation of the agency is a voluntary act, and that it can be controlled and ended at the will of its creator. But in the relationship between the infant and its keeper all these decisive characteristics are wholly wanting. The law imposes the keeper upon the child, who of course can neither control nor remove him; and the injustice, therefore, of making the latter responsible in any measure whatever for the torts of the former, would seem to be quite evident. Such subjectivity would be hostile in every respect to the natural rights of the infant, and consequently cannot with any show of reason be introduced into that provision which both necessity and law establish for his protection. Nor can it be said that its existence is necessary to give just enforcement to the rights of others. When it happens that both the infant and its custodian have been injured by the co-operative negligence of such custodian and a third party, it seems reasonable, at least in some degree, that the latter should be enabled to say to the custodian: "You and I, by our common carelessness, have done this wrong, and therefore neither can look to the other for redress." But when such wrong-doer says to the infant: "Your guardian and I, by our joint misconduct, have brought this loss upon you; consequently, you have no right of action against me, but you must look for indemnification to your guardian alone,"—a proposition is stated that appears to be without any basis either in good sense

or law. The conversion of the infant, who is entirely free from fault, into a wrong-doer, by imputation, is a logical contrivance uncongenial with the spirit of jurisprudence. The sensible and legal doctrine is this: An infant of tender years cannot be charged with negligence, nor can he be so charged with the commission of such fault by substitution, for he is incapable of appointing an agent; the consequence being that he can in no case be considered to be the blamable cause, either in whole or in part, of his own injury. There is no injustice nor hardship in requiring all wrong-doers to be answerable to a person who is incapable either of self-protection, or of being a participator in their misfeasance. Nor is it to be overlooked that the theory here repudiated, if it should be adopted, would go the length of making an infant in its nurse's arms answerable for all the negligences of such nurse while thus employed in its service. Every person so damaged by the careless custodian would be entitled to his action against the infant. If the neglects of the guardian are to be regarded as the neglects of the infant, as was asserted in the New York decisions, it would, from logical necessity, follow that the infant must indemnify those who should be harmed by such neglects. That such a doctrine has never prevailed is conclusively shown by the fact that in the reports there is no indication that such a suit has ever been brought.

It has already been observed that judicial opinions touching the subject just discussed are in a state of direct antagonism, and it would therefore serve no useful purpose to refer to any of them. It is sufficient to say that the leading text-writers have concluded that the weight of such authority is adverse to the doctrine that an infant can become in any wise a tort-feasor by imputation. 1 Shear. & R. Neg. § 75; Whart. Neg. § 311; 2 Wood, Ry. Law, 1284. In our opinion, the weight of reason is in the same scale.

It remains to add that we do not think the damages so excessive as to place the verdict under judicial control.

Let the circuit court be advised to render judgment on the finding of the jury.

(This rule is adopted in a majority of the states: *Warren v. Manchester St. Ry.*, 70 N. H. 352, 47 Atl. 735 [citing many cases]; *Robinson v. Cone*, 22 Vt. 214, 54 Am. Dec. 67; *Murphy v. Derby St. R. Co.*, 73 Conn. 249, 47 Atl. 120; *Fink v. Des Moines*, 115 Iowa, 641, 89 N. W. 28; *Chicago City R. Co. v. Wilcox*, 138 Ill. 370, 27 N. E. 899, 21 L. R. A. 76 [a valuable case]; *Chicago City R. Co. v. Tuohy*, 196 Ill. 410, 63 N. E. 997, 58 L. R. A. 270; *Markey v. Consolidated Traction Co.*, 65 N. J. Law, 82, 46 Atl. 573; *City of Evansville v. Senhenn*, 151 Ind. 42, 47 N. E. 634, 51 N. E. 88, 41 L. R. A. 728, 68 Am. St. Rep. 218; *Huff v. Ames*, 16 Neb. 139, 19 N. W. 623, 49 Am. Rep. 716; *Bottoms v. Railroad*, 114 N. C. 699, 19 S. E. 730; *Dicken v. Liverpool Salt Co.*, 41 W. Va. 511, 23 S. E. 582; *City of Roanoke v. Shull*, 97 Va. 419, 34 S. E. 34, 75 Am. St. Rep. 791; *Erie City Pass. Co. v. Schuster*, 113 Pa. 412, 6 Atl. 269, 57 Am. Rep. 471; *Bellefontaine & I. R. Co. v. Snyder*, 18 Ohio St. 408, 98 Am. Dec. 175; *Winters v. Railroad Co.*, 99 Mo. 509, 12 S. W. 652, 6 L. R. A. 536,

17 Am. St. Rep. 591; *Shippy v. Village of Au Sable*, 85 Mich. 280, 48 N. W. 584. But when the parent himself sues, on the ground of loss of service, his negligence, contributing to the child's injury, may be shown. *Chicago & A. R. Co. v. Logue*, 158 Ill. 621, 42 N. E. 53; *Bellefontaine R. Co. v. Snyder*, 24 Ohio St. 670.)

## 5. Imputation of negligence to passenger—Former English doctrine now overruled.

(116 U. S. 366, 6 Sup. Ct. 391, 29 L. Ed. 652.)

LITTLE v. HACKETT (in part).

(Supreme Court of the United States. January 4, 1886.)

### NEGLIGENCE OF CARRIER NOT IMPUTABLE TO PASSENGER.

A person who hires a public hack, and gives the driver directions as to the place to which he wishes to be conveyed, but exercises no other control over the conduct of the driver, is not responsible for his acts or negligence, or prevented from recovering against a railroad company for injuries suffered from a collision of its train with the hack, caused by the concurring negligence of the managers of the train and of the driver. In other words, the negligence of the driver is not imputed to his passenger.

In Error to the Circuit Court of the United States for the District of New Jersey.

Plaintiff hired a public hackney coach, and directed the driver as to the place to which he desired to go. While the driver was following out such directions the carriage was struck by an engine of a passing train, and plaintiff was injured. The accident was the result of the concurring negligence of the managers of the train and the driver of the carriage. The trial court charged "that where a person hires a public hack or carriage, which at the time is in the care of a driver, for the purpose of temporary conveyance, and gives directions to the driver as to the place or places to which he desires to be conveyed, and gives no special directions as to his mode or manner of driving, he is not responsible for the acts or negligence of the driver." Plaintiff recovered judgment, and this instruction is alleged as error. Judgment affirmed.

FIELD, J. That one cannot recover damages for an injury to the commission of which he has directly contributed, is a rule of established law and a principle of common justice. And it matters not whether that contribution consists in his participation in the direct cause of the injury, or in his omission of duties which, if performed, would have prevented it. If his fault, whether of omission or commission, has been the proximate cause of the injury, he is without remedy against one also in the wrong. It would seem that the converse of this doctrine should be accepted as sound,—that when one has been injured by the wrongful

act of another, to which he has in no respect contributed, he should be entitled to compensation in damages from the wrong-doer. And such is the generally received doctrine, unless a contributory cause of the injury has been the negligence or fault of some person towards whom he sustains the relation of superior or master, in which case the negligence is imputed to him, though he may not have personally participated in or had knowledge of it; and he must bear the consequences. The doctrine may also be subject to other exceptions growing out of the relation of parent and child or guardian and ward, and the like. Such a relation involves considerations which have no bearing upon the question before us.

To determine, therefore, the correctness of the instruction of the court below—to the effect that if the plaintiff did not exercise control over the conduct of the driver at the time of the accident, he is not responsible for the driver's negligence, nor precluded thereby from recovering in the action—we have only to consider whether the relation of master and servant existed between them. Plainly, that relation did not exist. The driver was the servant of his employer, the livery-stable keeper, who hired out him, with horse and carriage, and was responsible for his acts. Upon this point we have a decision of the court of exchequer in *Quarman v. Burnett*, 6 Mees. & W. 499. In that case it appeared that the owners of a chariot were in the habit of hiring, for a day or a drive, horses and a coachman from a job-mistress, for which she charged and received a certain sum. She paid the driver by the week, and the owners of the chariot gave him a gratuity for each day's service. On one occasion he left the horses unattended, and they ran off, and against the chaise of the plaintiff, seriously injuring him and the chaise, and he brought an action against the owners of the chariot, and obtained a verdict; but it was set aside on the ground that the coachman was the servant of the job-mistress, who was responsible for his negligence. In giving the opinion of the court, Baron Parke said: "It is undoubtedly true that there may be special circumstances which may render the hirer of job horses and servants responsible for the negligence of the servant, though not liable by virtue of the general relation of master and servant. He may become so by his own conduct; as by taking the actual management of the horses, or ordering the servant to drive in a particular manner, which occasions the damage complained of, or to absent himself at any particular moment, and the like." As none of these circumstances existed, it was held that the defendants were not liable, because the relation of master and servant between them and the driver did not exist. This doctrine was approved and applied by the queen's bench division, in the recent case of *Jones v. Corporation of Liverpool*, 14 Q. B. Div. 890. The corporation owned a water-cart, and contracted with a Mrs. Dean for a horse and driver, that it might be used in watering the streets. The horse belonged to her, and the driver she employed was not under the control of the corporation otherwise

than its inspector directed him what streets or portions of streets to water. Such directions he was required to obey under the contract with Mrs. Dean for his employment. The carriage of the plaintiff was injured by the negligent driving of the cart, and, in an action against the corporation for the injury, he recovered a verdict, which was set aside upon the ground that the driver was the servant of Mrs. Dean, who had hired both him and the horse to the corporation. In this country there are many decisions of courts of the highest character to the same effect, to some of which we shall presently refer.

The doctrine, resting upon the principle that no one is to be denied a remedy for injuries sustained, without fault by him, or by a party under his control and direction, is qualified by cases in the English courts, wherein it is held that a party who trusts himself to a public conveyance is in some way identified with those who have it in charge, and that he can only recover against a wrong-doer when they who are in charge can recover; in other words, that their contributory negligence is imputable to him, so as to preclude his recovery for an injury when they, by reason of such negligence, could not recover. The leading case to this effect is *Thorogood v. Bryan*, decided by the court of common pleas in 1849. 8 C. B. 115. It there appeared that the husband of the plaintiff, whose administratrix she was, was a passenger in an omnibus. The defendant, Mrs. Bryan, was the proprietress of another omnibus, running on the same line of road. Both vehicles had started together, and frequently passed each other, as either stopped to take up or set down a passenger. The deceased, wishing to alight, did not wait for the omnibus to draw up to the curb, but got out while it was in motion, and far enough from the path to allow another carriage to pass on the near side. The defendant's omnibus coming up at the moment, he was run over, and in a few days afterwards died from the injuries sustained. The court, among other things, instructed the jury that if they were of the opinion that want of care on the part of the driver of the omnibus in which the deceased was a passenger, in not drawing up to the curb to put him down, had been conducive to the injury, the verdict must be for the defendant, although her driver was also guilty of negligence. The jury found for the defendant, and the court discharged a rule for a new trial, for misdirection, thus sustaining the instruction. The grounds of its decision were, as stated by Mr. Justice Coltman, that the deceased, having trusted the party by selecting the particular conveyance in which he was carried, had so far identified himself with the owner and her servants that if an injury resulted from their negligence, he must be considered a party to it; "in other words," to quote his language, "the passenger is so far identified with the carriage in which he is traveling, that want of care on the part of the driver will be a defense of the driver of the carriage which directly caused the injury." Mr. Justice Maule, in the same case, said that the passenger "chose his own conveyance, and must take the consequences of any default of the

driver he thought fit to trust." Mr. Justice Cresswell said: "If the driver of the omnibus the deceased was in had, by his negligence or want of due care and skill, contributed to any injury from a collision, his master clearly could maintain no action, and I must confess, I see no reason why a passenger, who employs the driver to carry him, stands in any different position." Mr. Justice Williams added that he was of the same opinion. He said: "I think the passenger must, for this purpose, be considered as identified with the person having the management of the omnibus he was conveyed in."

What is meant by the passenger being "identified with the carriage," or "with the person having its management," is not very clear. In a recent case, in which the court of exchequer applied the same test to a passenger in a railway train which collided with a number of loaded wagons that were being shunted from a siding by the defendant, another railway company, Baron Pollock said that he understood it to mean "that the plaintiff, for the purpose of the action, must be taken to be in the same position as the owner of the omnibus or his driver." *Armstrong v. Lancashire & Y. Ry. Co.*, L. R. 10 Exch. 47, 52. Assuming this to be the correct explanation, it is difficult to see upon what principle the passenger can be considered to be in the same position, with reference to the negligent act, as the driver who committed it, or as his master, the owner. Cases cited from the English courts, as we have seen, and numerous others decided in the courts of this country, show that the relation of master and servant does not exist between the passenger and the driver, or between the passenger and the owner. In the absence of this relation, the imputation of their negligence to the passenger, where no fault of omission or commission is chargeable to him, is against all legal rules. If their negligence could be imputed to him, it would render him, equally with them, responsible to third parties thereby injured, and would also preclude him from maintaining an action against the owner for injuries received by reason of it. But neither of these conclusions can be maintained. Neither has the support of any adjudged cases entitled to consideration.

The truth is the decision in *Thorogood v. Bryan* rests upon indefensible ground. The identification of the passenger with the negligent driver or the owner, without his personal co-operation or encouragement, is a gratuitous assumption. There is no such identity. The parties are not in the same position. The owner of a public conveyance is a carrier, and the driver or the person managing it is his servant. Neither of them is the servant of the passenger, and his asserted identity with them is contradicted by the daily experience of the world. *Thorogood v. Bryan* has not escaped criticism in the English courts. In the court of admiralty it has been openly disregarded. In *The Milan*, Dr. Lushington, the judge of the high court of admiralty, in speaking of that case, said: "With due respect to the judges who decided that case, I do not consider that it is necessary for me to dissect the judg-

ment, but I decline to be bound by it, because it is a single case ; because I know, upon inquiry, that it has been doubted by high authority ; because it appears to me not reconcilable with other principles laid down at common law ; and, lastly, because it is directly against *Hay v. La Neve*, [2 Shaw, 395,] and the ordinary practice of the court of admiralty." Lush. 388, 403.

In this country the doctrine of *Thorogood v. Bryan* has not been generally followed. In *Bennet v. New Jersey R. & T. Co.*, 36 N. J. Law, 225, 13 Am. Rep. 435, and *New York, L. E. & W. R. Co. v. Steinbrenner*, 47 N. J. Law, 161, 54 Am. Rep. 126, it was elaborately examined by the supreme court and the court of errors of New Jersey, in opinions of marked ability and learning, and was disapproved and rejected. In the first case it was held that the driver of a horse car was not the agent of the passenger so as to render the passenger chargeable for the driver's negligence. The car, in crossing the track of the railroad company, was struck by its train, and the passenger was injured, and he brought an action against the company. On the trial the defendant contended that there was evidence tending to show negligence by the driver of the horse car, which was in part productive of the accident, and the presiding judge was requested to charge the jury that if this was so, the plaintiff was not entitled to recover ; but the court instructed them that the carelessness of the driver would not affect the action, or bar the plaintiff's right to recover for the negligence of the defendant. And this instruction was sustained by the court. In speaking of the "identification" of the passenger in the omnibus with the driver, mentioned in *Thorogood v. Bryan*, the court, by the chief justice, said : "Such identification could result only in one way ; that is, by considering such driver the servant of the passenger. I can see no ground upon which such a relationship is to be founded. In a practical point of view, it certainly does not exist. The passenger has no control over the driver or agent in charge of the vehicle ; and it is this right to control the conduct of the agent which is the foundation of the doctrine that the master is to be affected by the acts of his servant. To hold that the conductor of a street car or of a railroad train is the agent of the numerous passengers who may chance to be in it, would be a pure fiction. In reality there is no such agency ; and if we impute it, and correctly apply legal principles, the passenger, on the occurrence of an accident from the carelessness of the person in charge of the vehicle in which he is being conveyed, would be without any remedy. It is obvious, in a suit against the proprietor of the car in which he was the passenger, there could be no recovery if the driver or conductor of such car is to be regarded as the servant of the passenger. And so, on the same ground, each passenger would be liable to every person injured by the carelessness of such driver or conductor, because, if the negligence of such agent is to be attributed to the passenger for one purpose, it would be entirely arbitrary to say that he is not to be af-

fectured by it for other purposes. 36 N. J. Law, 227, 228, 13 Am. Rep. 435.

In the latter case it appeared that the plaintiff had hired a coach and horses, with a driver, to take his family on a particular journey. In the course of the journey, while crossing the track of the railroad, the coach was struck by a passing train, and the plaintiff was injured. In an action brought by him against the railroad company, it was held that the relation of master and servant did not exist between him and the driver, and that the negligence of the latter, co-operating with that of persons in charge of the train, which caused the accident, was not imputable to the plaintiff, as contributory negligence, to bar his action.

In New York a similar conclusion has been reached. In *Chapman v. New Haven R. Co.*, 19 N. Y. 341, 75 Am. Dec. 344, it appeared that there was a collision between the trains of two railroad companies, by which the plaintiff, a passenger in one of them, was injured. The court of appeals of that state held that a passenger by railroad was not so identified with the proprietors of the train conveying him, or with their servants, as to be responsible for their negligence, and that he might recover against the proprietors of another train for injuries sustained from a collision through their negligence, although there was such negligence in the management of the train conveying him as would have defeated an action by its owners. In giving the decision, the court referred to *Thorogood v. Bryan*, and said that it could see no justice in the doctrine in connection with that case, and that to attribute to the passenger the negligence of the agents of the company, and thus bar his right to recover, was not applying any existing exception to the general rule of law, but was framing a new exception based on fiction and inconsistent with justice. The case differed from *Thorogood v. Bryan* in that the vehicle carrying the plaintiff was a railway train instead of an omnibus; but the doctrine of the English case, if sound, is as applicable to passengers on railway trains as to passengers in an omnibus; and it was so applied, as already stated, by the court of exchequer in the recent case of *Armstrong v. Lancashire & Y. R. Co.*

In *Dyer v. Erie Ry. Co.*, 71 N. Y. 228, the plaintiff was injured while crossing the defendant's railroad track on a public thoroughfare. He was riding in a wagon by the permission and invitation of the owner of the horses and wagon. At that time a train standing south of certain buildings, which prevented its being seen, had started to back over the crossing, without giving the driver of the wagon any warning of its approach. The horses, becoming frightened by the blowing off of steam from engines in the vicinity, became unmanageable, and the plaintiff was thrown or jumped from the wagon, and was injured by the train which was backing. It was held that no relation of principal and agent arose between the driver of the wagon and the plaintiff, and, although he traveled voluntarily, he was not responsible for the negligence of the driver, where he himself was not chargeable with negli-

gence and there was no claim that the driver was not competent to control and manage the horses.

A similar doctrine is maintained by the courts of Ohio. In *Transfer Co. v. Kelly*, 36 Ohio St. 86, 38 Am. Rep. 558, the plaintiff, a passenger on a car owned by a street railroad company, was injured by its collision with a car of the transfer company. The chief justice, in delivering the opinion of the court, said: "It seems to us that the negligence of the company, or of its servant, should not be imputed to the passenger, where such negligence contributed to his injury jointly with the negligence of a third party, any more than it should be so imputed where the negligence of the company, or its servant, was the sole cause of the injury." In the supreme court of Illinois the same doctrine is maintained. In the recent case of the *Wabash, St. L. & P. R. Co. v. Shacklet*, 105 Ill. 364, 44 Am. Rep. 791, the doctrine of *Thorogood's Case* was examined and rejected. Similar decisions have been made in the courts of Kentucky, Michigan, and California. *Danville, etc., T. Co. v. Stewart*, 2 Metc. (Ky.) 119; *Louisville, etc., R. Co. v. Case*, 9 Bush, 728; *Cuddy v. Horn*, 46 Mich. 596, 10 N. W. 32, 41 Am. Rep. 178; *Tompkins v. Clay Street R. Co.*, 66 Cal. 163, 4 Pac. 1165.

There is no distinction in principle whether the passengers be on a public conveyance, like a railroad train or an omnibus, or be on a hack hired from a public stand, in the street, for a drive. Those on a hack do not become responsible for the negligence of the driver if they exercise no control over him further than to indicate the route they wish to travel or the places to which they wish to go. If he is their agent, so that his negligence can be imputed to them to prevent their recovery against a third party, he must be their agent in all other respects, so far as the management of the carriage is concerned, and responsibility to third parties would attach to them for injuries caused by his negligence in the course of his employment. But, as we have already stated, responsibility cannot, within any recognized rules of law, be fastened upon one who has in no way interfered with and controlled in the matter causing the injury. From the simple fact of hiring the carriage or riding in it no such liability can arise. The party hiring or riding must in some way have co-operated in producing the injury complained of before he incurs any liability for it. "If the law were otherwise," as said by Mr. Justice Depue in his elaborate opinion in the latest case in New Jersey, "not only the hirer of the coach, but also all the passengers in it, would be under a constraint to mount the box, and superintend the conduct of the driver in the management and control of his team, or be put for remedy exclusively to an action against the irresponsible driver or equally irresponsible owner of a coach taken, it may be, from a coach-stand, for the consequences of an injury which was the product of the co-operating wrongful acts of the driver and of a third person, and that, too, though the passengers were ignorant of the character of the driver, and of the responsibility of the owner of the team, and

strangers to the route over which they were to be carried." 47 N. J. Law, 171, 54 Am. Rep. 126.

In this case it was left to the jury to say whether the plaintiff had exercised any control over the conduct of the driver further than to indicate the places to which he wished him to drive. The instruction of the court below, that unless he did exercise such control, and required the driver to cross the track at the time the collision occurred, the negligence of the driver was not imputable to him, so as to bar his right of action against the defendant, was therefore correct, and the judgment must be affirmed; and it is so ordered.

(Since this decision was rendered, the case of *Thorogood v. Bryan* has been overruled in England. *Mills v. Armstrong*, L. R. 13 App. Cas. 1. It has been rejected well-nigh universally in this country. *State v. Boston & M. R. Co.*, 80 Me. 430, 15 Atl. 36; *Noyes v. Boscawen*, 64 N. H. 361, 10 Atl. 690, 10 Am. St. Rep. 410; *Murray v. Boston Ice Co.*, 180 Mass. 165, 61 N. E. 1001; *Dyer v. Erie R. Co.*, 71 N. Y. 228; *Bunting v. Hogsett*, 139 Pa. 363, 21 Atl. 31, 33, 34, 12 L. R. A. 268, 23 Am. St. Rep. 192; *Noonan v. Consolidated Traction Co.*, 64 N. J. Law, 579, 46 Atl. 770; *Philadelphia, W. & B. R. Co. v. Hogeland*, 66 Md. 149, 7 Atl. 105, 59 Am. Rep. 159; *Street Ry. Co. v. Eadie*, 43 Ohio St. 91, 1 N. E. 519, 54 Am. Rep. 802; *Nesbit v. Town of Garner*, 75 Iowa, 314, 39 N. W. 516, 1 L. R. A. 152, 9 Am. St. Rep. 486; *Hydes Ferry Turnpike Co. v. Yates*, 108 Tenn. 428, 67 S. W. 69. But a person riding with another is, of course, chargeable with his own negligence whereby a collision with another carriage, a railway train, etc., results, as, e. g., if he perceives the danger in time, but does not warn the driver, who is ignorant of it. *Hoag v. New York Cent. & H. R. R. Co.*, 111 N. Y. 199, 18 N. E. 648; *Brickell v. New York Cent. & H. R. R. Co.*, 120 N. Y. 290, 24 N. E. 449, 17 Am. St. Rep. 648. So, in some states, he is held chargeable with the negligence of the driver when both are engaged in a joint enterprise. *Donnelly v. Brooklyn City R. Co.*, 109 N. Y. 16, 15 N. E. 733; *New York, C. & St. L. R. Co. v. Kistler*, 66 Ohio St. 326, 64 N. E. 130; *Koplitz v. City of St. Paul*, 86 Minn. 373, 90 N. W. 794, 58 L. R. A. 74.

In some states it is held that if a husband is driving his wife in a carriage, his negligence is imputed to her, so as to debar her right to recover for injuries in a collision [*Pennsylvania R. Co. v. Goodenough*, 55 N. J. Law, 577, 28 Atl. 3, 22 L. R. A. 460; *Carlisle v. Town of Sheldon*, 38 Vt. 440; *Peck v. New York, N. H. & H. R. Co.*, 50 Conn. 379]; but New York and some other states reject this doctrine [*Hoag v. New York Cent. & H. R. R. Co.*, 111 N. Y. 199, 18 N. E. 648; *Lake Shore & M. S. R. Co. v. McIntosh*, 140 Ind. 261, 38 N. E. 476; *Lammers v. Great Northern R. Co.*, 82 Minn. 120, 84 N. W. 728].

## 6. Effect of acting in an emergency.

(69 N. Y. 158, 25 Am. Rep. 162.)

TWOMLEY v. CENTRAL PARK, N. & E. R. R. CO. (In part).

(Court of Appeals of New York. March 27, 1877.)

### 1. CONTRIBUTORY NEGLIGENCE—ACTION IN EMERGENCY.

Where a passenger jumped from a moving street car to escape a threatened collision between the car and a train at a crossing, and was injured, the question of negligence in so doing is to be judged by the circumstances as they appeared to the passengers, and is not affected by the fact that the car passed in safety.

### 2. SAME—EVIDENCE.

Where a passenger jumped from a moving street car to escape a threatened collision with a train, and was injured, it was competent, on the question of contributory negligence in an action against the street car company, to show the action of the other passengers.

Action for personal injuries through negligence. On the 24th October, 1870, plaintiff took passage on one of defendant's horse cars in the city of New York. The track of defendant's road crosses the tracks of the New York Central & Hudson River Railroad Company near the Grand Central depot in said city. Just as the car reached a track upon which an express train was approaching, the driver stopped to allow a passenger to alight. If the car had remained stationary the train could have passed, but the driver whipped up his horses and the car passed upon the track in front of the train. The engineer reversed his engine and put on the brakes. All of the passengers in the car, with one exception, on perceiving the danger, rushed out and jumped from the car, and plaintiff in doing so fell and was seriously injured. The car passed over the track just in time to escape the engine. Judgment for plaintiff.

ALLEN, J. The question in this case was one of fact, depending upon conflicting evidence, and deductions to be drawn from the facts as they should be determined from the evidence. That question was determined adversely to the defendant. The jury have found that the plaintiff was placed by the reckless or careless act of the servants and agents of the defendant in such a position as compelled her to choose upon the instant, and in the face of an apparently great and impending peril, between two hazards, a dangerous leap from the moving car, or to remain in the car at certain peril. They have also found that her action was such as might have been taken by any one of ordinary prudence, placed in the same situation, and was not the result of an unreasonable alarm, and that the injury was the result of such enforced action. The verdict was that the misconduct of the persons in charge of the car was the proximate cause of the injury, without concurrent negli-

gence on the part of the plaintiff. The peril of remaining in the car was properly judged by the circumstances as they then appeared to the passengers, and not by the result. The fact that the car did pass over safely cannot reflect upon the action of the plaintiff, and does not prove that she was imprudent or negligent in jumping from the car; she was compelled to act, and chose the hazard which appeared to be the least, that is, to act upon the probabilities as they appeared at the time.

The liability of the defendant, upon the facts, is well established by authority. *Jones v. Boyce*, 1 Stark. 493; *Stokes v. Saltonstall*, 13 Pet. 181, 10 L. Ed. 115; *Buel v. N. Y. C. R. Co.*, 31 N. Y. 314, 88 Am. Dec. 271; *Filer v. Same*, 49 N. Y. 47, 10 Am. Rep. 327.

Evidence of the action of the other passengers was competent as a part of the *res gestæ*, and also as evidence of what was deemed prudent by those in the same situation, having an interest to take the least and avoid the greater hazard.

The only question was one of fact, and the judgment must be affirmed. All concur.

Judgment affirmed.

(See, to the same effect, *Lewis v. Long Island R. Co.*, 162 N. Y. 52, 56 N. E. 548; *Benoit v. Troy & L. R. Co.*, 154 N. Y. 223, 48 N. E. 524; *Vallo v. United States Exp. Co.*, 147 Pa. 404, 23 Atl. 594, 14 L. R. A. 743, 30 Am. St. Rep. 741; *Donahue v. Kelly*, 181 Pa. 93; *Cody v. New York & N. E. R. Co.*, 151 Mass. 462, 24 N. E. 402, 7 L. R. A. 843; *Lawrence v. Green*, 70 Cal. 417, 11 Pac. 750, 59 Am. Rep. 428; *Chicago & A. R. Co. v. Becker*, 76 Ill. 25; *Stokes v. Saltonstall*, 13 Pet. 181, 10 L. Ed. 115. But "if a party *by his own negligence* has placed himself in a situation of peril, and, being called upon in a sudden exigency to act, mistakes his best course through an error of judgment, he is not thereby relieved." *Schneider v. Second Ave. R. Co.*, 133 N. Y. 583, 30 N. E. 752.)

## 7. Effect of acting under stress of peril to human life.

(43 N. Y. 502, 3 Am. Rep. 721.)

ECKERT v. LONG ISLAND R. CO.

(Court of Appeals of New York. January 24, 1871.)

### 1. NEGLIGENCE—CONTRIBUTORY—EFFORT TO SAVE LIFE OF ANOTHER IN PERIL.

Negligence cannot be imputed by law to a person in his effort to save the life of another in extreme peril, unless made under such circumstances as to constitute rashness in the judgment of prudent persons.

### 2. SAME—INSTRUCTIONS TO JURY.

Plaintiff's intestate, standing 50 feet from defendant's railroad track, suddenly discovered a small child on the track in front of an approaching train, and, without a moment's hesitation, ran to it, seized it, and threw it in safety from the track, but was struck and killed by the engine. *Held*, in an action to recover damages for his death, that the court properly refused to charge that, if the deceased placed himself in peril from which he received the injury to save the child, plaintiff could not recover, but properly left to the jury the question of whether the negligence of intestate contributed to his injury.

Appeal from Supreme Court, General Term, Second District.

Action brought in the city court of Brooklyn by Anna Eckert, as administratrix of Henry Eckert, deceased, against the Long Island Railroad Company, to recover damages for the death of her husband, caused by the alleged negligence of defendant. The testimony of plaintiff's witnesses showed that the intestate, while standing talking with a companion about 50 feet from defendant's track in East New York, suddenly discovered a child three or four years old on the track at a crossing in front of a rapidly approaching train, and he immediately ran and seized it and threw it from the track, but before he could get clear of the track was struck by the locomotive and killed. Plaintiff's witnesses testified that the train was running at full speed, and that no signal was given, which was denied by defendant's witnesses. Defendant asked a nonsuit on the ground of the contributory negligence of intestate, which was refused. The court also refused to charge, at defendant's request, that if deceased voluntarily placed himself in peril, from which he received the injury, to save the child, whether the child was or was not in danger, the plaintiff could not recover, and submitted to the jury the question whether the negligence of deceased contributed to the accident. Defendant duly excepted. Verdict and judgment for plaintiff, which was affirmed upon appeal to the supreme court. Defendant appealed.

GROVER, J. The important question in this case arises upon the exception taken by the defendant's counsel to the denial of his motion for a nonsuit, made upon the ground that the negligence of the plaintiff's intestate contributed to the injury that caused his death. The evidence showed that the train was approaching in plain view of the deceased, and had he for his own purposes attempted to cross the track, or with a view to save property placed himself voluntarily in a position where he might have received an injury from a collision with the train, his conduct would have been grossly negligent, and no recovery could have been had for such injury. But the evidence further showed that there was a small child upon the track, who, if not rescued, must have been inevitably crushed by the rapidly approaching train. This the deceased saw, and he owed a duty of important obligation to this child to rescue it from its extreme peril, if he could do so without incurring great danger to himself. Negligence implies some act of commission or omission wrongful in itself. Under the circumstances in which the deceased was placed, it was not wrongful in him to make every effort in his power to rescue the child, compatible with a reasonable regard for his own safety. It was his duty to exercise his judgment as to whether he could probably save the child without serious injury to himself. If, from the appearances, he believed that he could, it was not negligence to make an attempt so to do, although believing that possibly he might fail and receive an injury himself. He had no

time for deliberation. He must act instantly, if at all, as a moment's delay would have been fatal to the child. The law has so high a regard for human life that it will not impute negligence to an effort to preserve it, unless made under such circumstances as to constitute rashness in the judgment of prudent persons. For a person engaged in his ordinary affairs, or in the mere protection of property, knowingly and voluntarily to place himself in a position where he is liable to receive a serious injury, is negligence which will preclude a recovery for an injury so received; but when the exposure is for the purpose of saving life it is not wrongful, and therefore not negligent, unless such as to be regarded either rash or reckless. The jury were warranted in finding the deceased free from negligence under the rule as above stated. The motion for a nonsuit was therefore properly denied. That the jury were warranted in finding the defendant guilty of negligence in running the train in the manner it was running requires no discussion. None of the exceptions taken to the charge as given, or to the refusals to charge as requested, affect the right of recovery. Upon the principle above stated, the judgment appealed from must be affirmed, with costs.

CHURCH, C. J., and PECKHAM and RAPALLO, JJ., concur.  
ALLEN and FOLGER, JJ., dissenting.

Judgment affirmed.

(See, to the same effect, *Spooner v. Railroad Co.*, 115 N. Y. 22, 21 N. E. 696; *West Chicago St. R. Co. v. Liderman*, 187 Ill. 463, 58 N. E. 367, 32 L. R. A. 655, 79 Am. St. Rep. 226; *Peyton v. Texas & P. R. Co.*, 41 La. Ann. 861, 6 South. 690, 17 Am. St. Rep. 430; *Central R. Co. v. Crosby*, 74 Ga. 737, 58 Am. Rep. 463; *Linnehan v. Sampson*, 126 Mass. 506, 30 Am. Rep. 692; *Pennsylvania Co. v. Roney*, 89 Ind. 453, 46 Am. Rep. 173; *Cottrill v. Railroad Co.*, 47 Wis. 634, 3 N. W. 376, 32 Am. Rep. 796. But the rule has been held inapplicable where a person exposed himself to imminent danger merely to save his property, as where an owner of cattle got on a railroad track to drive them off while a train was approaching. *Morris v. Railway Co.*, 148 N. Y. 182, 42 N. E. 579.)

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#### IV. LIABILITY OF A MASTER FOR THE NEGLIGENCE OF HIS SERVANT.

(64 N. Y. 129, 21 Am. Rep. 597.)

ROUNDS v. DELAWARE, L. & W. R. CO.

(Court of Appeals of New York. February 1, 1876.)

##### 1. MASTER AND SERVANT—LIABILITY FOR WRONG DONE BY SERVANT.

The master is responsible civiliter for the wrongful act of his servant, causing injury to a third person, whether the act was one of negligence or positive misfeasance, provided the servant was at the time acting for the master, and within the scope of the business intrusted to him; and if.

in the line of his duty, he is authorized to use force, the master commits it to him to decide what degree of force he shall use, and is liable if, by his misjudgment and violence of temper, a degree of force is used, even though willfully and recklessly, which is not required by the necessity of the occasion, and a third person is thereby injured. If, however, the servant, under guise and cover of executing his master's orders, willfully and designedly, for the purpose of accomplishing his own independent, malicious, or wicked purposes, does an injury to another, the master is not liable.

**2. SAME.**

In an action for personal injuries received by being run over by defendant's train, it appeared that plaintiff, a boy of 12 years, wrongfully on the platform of defendant's baggage-car, being told by the baggageman to get off while the train was in motion in the switch-yard, and protesting on account of the danger from wood-piles lying along the track, was kicked off by the baggageman, and, striking the wood-pile, rolled under the train and was injured. Defendant had posted rules forbidding all persons not employees to ride on the baggage-car, and requiring the baggageman to rigidly enforce them. *Held*, that it was a question for the jury whether the baggageman acted in the line of his duty, or willfully and maliciously, outside of and in excess of his duty, and a finding for plaintiff should not be disturbed.

Appeal from Supreme Court, General Term, Third Department.

Action by George M. Rounds, by guardian, etc., against the Delaware, Lackawanna & Western Railroad Company, for injuries sustained by plaintiff by being kicked off of one of defendant's baggage-cars by the baggageman. Plaintiff, a boy 12 years of age, jumped on the platform of the baggage-car in an empty train while it was being switched in defendant's yard, and, being found by the baggageman while the train was in motion, was ordered off; but, being unable to jump off without great danger from wood-piles on the side of the track, told the baggageman of such fact; whereupon the baggageman kicked him off, and plaintiff, striking against the wood-pile, rolled under the car, and his leg was crushed. A printed notice was posted up in the baggage-car, and another near where plaintiff was standing, as follows: "No person will be allowed to ride on the baggage-car except the regular trainmen employed thereon. Conductor and baggageman must see this order strictly enforced." The posted time-cards contained another notice, as follows: "Train baggagemen must not permit any person to ride in the baggage-car except the conductor and news agent connected with the train. Conductor and baggageman will be held alike accountable for a rigid enforcement of this rule." Defendant asked a nonsuit on the ground that plaintiff was a trespasser, and was guilty of contributory negligence, and that the act of the baggageman was willful and outside the line of his employment; which the court denied, ruling that it was a question for the jury whether the baggageman was acting within the authority of the company in putting plaintiff off, and whether he acted willfully and wrongfully, to which defendant excepted. The court charged the jury that plaintiff was a trespasser on the

car, but if the baggageman, nevertheless, in the discharge of his duty, pushed him off the train in an improper manner, and at a dangerous place, defendant was liable; and also that, if the baggageman pushed plaintiff off the train, and, in doing so, was acting as the employee of defendant, in good faith, in the discharge of a duty he owed the company, defendant would be liable for the careless and negligent discharge of duty; but if he was acting willfully and maliciously towards plaintiff, outside of and in excess of his duty, then the baggageman alone would be responsible in law for the consequences; to which defendant excepted, and requested the court to modify the charge, or to charge that defendant was not liable if the baggageman acted willfully and wantonly, without authority from defendant. Verdict and judgment for plaintiff. On appeal the judgment was affirmed by the general term. 3 Hun, 329. Defendant again appealed.

ANDREWS, J. There is, at this time, but little conflict of judicial opinion in respect to the general rule by which the liability of a master for the misconduct of his servant, resulting in injury to third persons, is to be tested and ascertained. In *Higgins v. Turnpike Co.*, 46 N. Y. 23, 7 Am. Rep. 293, this subject was considered by this court, and the rule was declared to be that the master was responsible civiliter for the wrongful act of the servant causing injury to a third person, whether the act was one of negligence or positive misfeasance, provided the servant was at the time acting for the master and within the scope of the business intrusted to him. The master is liable only for the authorized acts of the servant, and the root of his liability for the servant's acts is his consent, express or implied, thereto. When the master is to be considered as having authorized the wrongful act of the servant, so as to make him liable for his misconduct, is the point of difficulty. Where authority is conferred to act for another, without special limitation, it carries with it, by implication, authority to do all things necessary to its execution; and when it involves the exercise of the discretion of the servant, or the use of force towards or against another, the use of such discretion or force is a part of the thing authorized; and when exercised becomes, as to third persons, the discretion and act of the master; and this, although the servant departed from the private instructions of the master, provided he was engaged at the time in doing his master's business, and was acting within the general scope of his employment. It is not the test of the master's liability for the wrongful act of the servant, from which injury to a third person has resulted, that he expressly authorized the particular act and conduct which occasioned it. In most cases, where the master has been held liable for the negligent or tortious act of the servant, the servant acted, not only without express authority to do the wrong, but in violation of his duty to the master.

It is, in general, sufficient to make the master responsible that he gave to the servant an authority or made it his duty to act in respect to the business in which he was engaged when the wrong was committed, and that the act complained of was done in the course of his employment. The master in that case will be deemed to have consented to and authorized the act of the servant, and he will not be excused from liability, although the servant abused his authority, or was reckless in the performance of his duty, or inflicted an unnecessary injury in executing his master's orders. The master who puts the servant in a place of trust or responsibility, or commits to him the management of his business or the care of his property, is justly held responsible when the servant, through lack of judgment or discretion, or from infirmity of temper, or under the influence of passion aroused by the circumstances and the occasion, goes beyond the strict line of his duty or authority, and inflicts an unjustifiable injury upon another. But it is said that the master is not responsible for the willful act of the servant. This is the language of some of the cases, and it becomes necessary to ascertain its meaning when used in defining the master's responsibility.

The case of *McManus v. Crickett*, 1 East, 106, turned upon the form of the action, and the distinction between trespass and case; but Lord Kenyon in pronouncing the judgment of the court said: "Where a servant quits sight of the object for which he was employed, and, without having in view his master's orders, pursues that which his own malice suggests, his master will not be liable for such acts." This language was cited with approval in *Wright v. Wilcox*, 19 Wend. 343, 32 Am. Dec. 507; and the master was held not to be responsible where the servant, in driving his master's wagon along the highway, willfully whipped up his horses while the plaintiff's son, a young lad, was standing between the front and back wheels, attempting, with the implied permission of the servant, to get into the wagon, in consequence of which the boy was thrown down, run over, and injured. The servant was cautioned by a by-stander that if he did not stop he would kill the boy. The court, in the opinion delivered, assumed that the evidence showed that the servant whipped up the horses with a willful design to throw the boy off. The act of the servant was imminently dangerous, and it might reasonably be inferred from the evidence that he designed the injury which resulted from it. "The law," said Cowen, J., "holds such a willful act a departure from the master's business." So in *Vanderbilt v. Turnpike Co.*, 2 N. Y. 479, 51 Am. Dec. 315, the master of the defendant's boat intentionally ran into the boat of the plaintiff, and the court held that this was a willful trespass of the master, for which the defendant was not liable. In *Lyons v. Martin*, 8 Adol. & E. 512, it was held that where a servant, merely authorized to distrain cattle damage-feasant, drives cattle from the highway into his master's close, and there distrains them, the master is not liable. In *Mali v. Lord*, 35

N. Y. 381, 100 Am. Dec. 448, the act complained of was an illegal imprisonment of the plaintiff by the servant of the defendant, and the court held that the authority to do the act could not be implied from the general employment of the servant. The imprisonment, assuming that the suspicion upon which it was made was well founded, was illegal. The master could not lawfully have detained the defendant if he had been present, and the court were of the opinion that the servant could not be said to be engaged in his master's business when he assumed to do what the master could not have done himself. See, also, *Bolingbroke v. Local Board, etc.*, L. R. 9 C. P. 575. It is quite useless to attempt to reconcile all the cases. The discrepancy between them arises not so much from a difference of opinion as to the rule of law on the subject as from its application to the facts of a given case.

It seems to be clear enough from the cases in this state that the act of the servant causing actionable injury to a third person does not subject the master to civil responsibility in all cases where it appears that the servant was at the time in the use of his master's property, or because the act, in some general sense, was done while he was doing his master's business, irrespective of the real nature and motive of the transaction. On the other hand, the master is not exempt from responsibility in all cases on showing that the servant, without authority, designed to do the act or the injury complained of. If he is authorized to use force against another, when necessary in executing his master's orders, the master commits it to him to decide what degree of force he shall use; and if, through misjudgment or violence of temper, he goes beyond the necessity of the occasion, and gives a right of action to another, he cannot, as to third persons, be said to have been acting without the line of his duty, or to have departed from his master's business. If, however, the servant, under guise and cover of executing his master's orders, and exercising the authority conferred upon him, willfully and designedly, for the purpose of accomplishing his own independent, malicious, or wicked purposes, does an injury to another, then the master is not liable. The relation of master and servant, as to that transaction, does not exist between them. It is a willful and wanton wrong and trespass, for which the master cannot be held responsible; and, when it is said that the master is not responsible for the willful wrong of the servant, the language is to be understood as referring to an act of positive and designed injury, not done with a view to the master's service or for the purpose of executing his orders. In this view, the judge at the trial correctly refused to qualify his charge, or to charge that it was sufficient to exempt the defendant from liability that the act of the baggageman in putting the plaintiff off the car was willful. He had already charged that if the baggageman acted "willfully and maliciously towards the plaintiff, outside of and in excess of his duty," in putting him off the car, the defendant was not liable. If the counsel intended

to claim that the defendant was exempt from responsibility if the baggageman acted willfully, although without malice, the point was not well taken. That the baggageman designed to put the plaintiff off the car was not disputed, and this was consistent with the authority and duty intrusted to him. But a willful act which will exempt a master from liability for the tort of his servant must be done outside of his duty and his master's business. The charge was therefore strictly correct, and the exception was not well taken.

Neither was the defendant entitled to have the court rule, as matter of law, that, upon the circumstances as shown by the evidence on the part of the plaintiff, the defendant was not responsible. It is conceded that the removal of the plaintiff from the car was within the scope of the authority conferred upon the baggageman. The plaintiff had no right to be there. He was not a passenger or servant, and had no express or implied permission to be upon the car. The baggageman, in kicking the boy from the platform, acted violently and unreasonably; and to do this while the car was in motion, and when the space between it and the wood-pile was so small, was dangerous in the extreme. But the court could not say from the evidence that the baggageman was acting outside of and without regard to his employment, or designed to do the injury which resulted, or that the act was willful, within the rule we have stated. If the master, when sued for an injury resulting from the tortious act of his servant while apparently engaged in executing his orders, claims exemption upon the ground that the servant was, in fact, pursuing his own purposes, without reference to his master's business, and was acting maliciously and willfully, it must, ordinarily, be left to the jury to determine this issue upon a consideration of all the facts and circumstances proved. See *Jackson v. Railroad Co.*, 47 N. Y. 274, 7 Am. Rep. 448. There may be cases where this rule does not apply, and where the court would be justified in taking the case from the jury; but where different inferences may be drawn from the facts proved, and when, in one view, they may be consistent with the liability of the master, the case must be left to the jury. The fact that the plaintiff was a trespasser on the cars is not a defense. The lad did not forfeit his life, or subject himself to the loss of his limbs, because he was wrongfully on the car. The defendant owed him no duty of care by reason of any special relation assumed or existing between the company and him, but he was entitled to be protected against unnecessary injury by the defendant or its servants in exercising the right of removing him, and especially from the unnecessary and unjustifiable act of the baggageman by which his life was put in peril, and which resulted in his losing his limb. *Sanford v. Railroad Co.*, 23 N. Y. 343, 80 Am. Dec. 286; *Lovett v. Railroad Co.*, 9 Allen, 557; *Holmes v. Wakefield*, 12 Allen, 580, 90 Am. Dec. 171.

No error of law was committed on the trial, and the judgment of the general term should be affirmed, with costs. All concur.

Judgment affirmed.

(See also *Mott v. Ice Co.*, 73 N. Y. 543; *Quinn v. Power*, 87 N. Y. 535, 41 Am. Rep. 392; *Palmeri v. Manhattan R. Co.*, 133 N. Y. 261, 30 N. E. 1001, 16 L. R. A. 136, 28 Am. St. Rep. 632; *Limpus v. Omnibus Co.*, 1 Hurl. & C. 526; *Mitchell v. Crassweller*, 13 C. B. 237; *Cavanagh v. Dinsmore*, 12 Hun, 465; *Howe v. Newmarch*, 12 Allen, 49; *Walton v. Car Co.*, 139 Mass. 556, 2 N. E. 101; *McCarthy v. Timmins*, 178 Mass. 378, 59 N. E. 1038, 86 Am. St. Rep. 490; *Driscoll v. Scanlon*, 165 Mass. 348, 43 N. E. 100, 52 Am. St. Rep. 523; *Ritchie v. Waller*, 63 Conn. 155, 28 Atl. 29, 27 L. R. A. 161, 38 Am. St. Rep. 361; *Stone v. Hills*, 45 Conn. 44, 29 Am. Rep. 635; *Philadelphia & R. R. Co. v. Derby*, 14 How. 468, 14 L. Ed. 502.)

## V. LIABILITY OF AN EMPLOYER FOR THE NEGLIGENCE OF A CONTRACTOR.

(156 N. Y. 109, 50 N. E. 957, 41 L. R. A. 391, 66 Am. St. Rep. 542.)

BERG v. PARSONS (in part).

(Court of Appeals of New York. June 7, 1898.)

### INDEPENDENT CONTRACTOR—NEGLIGENCE—LIABILITY OF EMPLOYER.

Where the relation of master and servant or principal and agent does not exist, but an injury results from negligence in the performance of work by a contractor, the employer is not responsible for the contractor's negligence, or that of his servants. Thus, where an owner of real estate engaged a contractor to remove rock from his premises by blasting, he was *held* not responsible for the negligence of such contractor or his employees in doing the work, whereby injury was done to adjacent premises.

Appeal from Supreme Court, General Term, First Department.

Action for damages for injuries alleged to have been caused to the building of plaintiff by reason of the negligence of a contractor employed by defendant to blast out a cellar on the premises of defendant adjacent to those of plaintiff. From a judgment of the General Term (90 Hun, 267, 35 N. Y. Supp. 780) affirming a judgment for plaintiff, defendant appeals. Reversed.

MARTIN, J. The doctrine of respondeat superior is based upon the relation of master and servant or principal and agent. As no such relation existed between the parties, I find no ground upon which the judgment in this action can be sustained.

The rule that where the relation of master and servant or principal and agent does not exist, but an injury results from negligence in the performance of work by a contractor, the party with whom he contracts

is not responsible for his negligence or that of his servants, is well established by the authorities in this state. *Blake v. Ferris*, 5 N. Y. 48, 55 Am. Dec. 304; *Pack v. Mayor, etc.*, 8 N. Y. 222; *Kelly v. Mayor, etc.*, 11 N. Y. 432; *McCafferty v. Railroad Co.*, 61 N. Y. 178, 19 Am. Rep. 267; *King v. Railroad Co.*, 66 N. Y. 181, 23 Am. Rep. 37; *Town of Pierrepont v. Loveless*, 72 N. Y. 211; *Ferguson v. Hubbell*, 97 N. Y. 507, 49 Am. Rep. 544; *Herrington v. Village of Lansingburgh*, 110 N. Y. 145, 17 N. E. 728, 6 Am. St. Rep. 348; *Roemer v. Striker*, 142 N. Y. 134, 36 N. E. 808.

In *Blake v. Ferris* the defendant had a license to construct, at his own expense, a sewer in a public street. He engaged another person to construct it for a stipulated price. The sewer was left at night in a negligent manner by the workmen who were employed in its construction. It was held that the immediate employer of the servant, through whose negligence the injury occurred, was responsible, but that the primary principal or employer was not.

In *Pack v. Mayor, etc.*, which was an action for damages caused by the alleged negligence of a contractor in blasting rocks, which resulted in injury to the plaintiff's house, in personal injury to his wife, and in killing one of his children, it was held that, as the work was being prosecuted under a contract with a person who was to perform it, the corporation was not liable, but that a recovery for such an injury could be had only against the person actually guilty of the wrongful act, or against one to whom he stands in the relation of servant or agent, and that the contractor in such a case was not the servant or agent of the corporation.

The *Kelly Case* was also an action for damages occasioned by negligence in blasting. In that case there was a contract between the city and a contractor to grade a certain street, and it was held that the city was not liable for damages occasioned by negligence in the performance of the work, but that the contractor was alone liable, although the contract provided that the work should be done under the direction and to the satisfaction of the officers of the corporation.

The *McCafferty Case* was for an injury to the plaintiff's store and property by alleged negligence in blasting rocks necessary for the construction of the defendant's road. There the corporation had let the work of constructing the road by contract, and the negligence was that of the contractor or his employees; and this court held that the defendant was not liable, and that there was no distinction between real and personal property, so far as its negligent use and management were concerned, or of negligent acts upon it by others.

In the *King Case* the owner of real property was held not liable for injuries resulting from negligence on the part of a contractor or his employees engaged in performing a lawful contract for specific work upon the premises of the defendant, and the rule that the law will not impute

to one person the negligent acts of another, unless the relation of master and servant or principal and agent exists, was again asserted.

The same doctrine was held in the *Town of Pierrepont Case*, where the *Blake* and *Pack Cases* were followed, and it was declared that a contractor or his employees did not stand in the relation of servants to a person who was the owner of the property and with whom the contract was made, and that the latter was not answerable for their negligence.

In *Ferguson v. Hubbell*, where the injury for which a recovery was sought resulted from the act of a contractor, it was again decided that the contractor was in no sense the servant of the defendant, and that the doctrine of *respondeat superior* did not apply.

The *Herrington Case* was for damages occasioned by carelessness in blasting. The work was done by contractors, and the court followed its previous decisions, and held that the defendant was not liable, but that the injury was occasioned by the negligence of the contractors, and that they alone were responsible.

The *Roemer Case* was also for negligence in blasting and excavating on the defendant's premises which adjoined the premises of the plaintiff. The work was done by a contractor, and the owner was held not liable.

It seems to me that the principle of these decisions is decisive of the case at bar, and is directly adverse to the contention of the respondent. The only authorities in this state cited as sustaining the doctrine contended for are *Blake v. Ferris*, 5 N. Y. 48, 55 Am. Dec. 304, and *Storrs v. City of Utica*, 17 N. Y. 104, 72 Am. Dec. 436. The *Blake Case* we have already referred to, which is a direct authority against the doctrine it is cited to sustain. In the *Storrs Case* the facts were different, and the principle of the decision has no application. There the doctrine of the *Blake*, *Kelly*, and *Pack Cases* was expressly indorsed in the opinion of Judge Comstock, who said: "Now, in these two cases of *Pack v. Mayor*, etc., and *Kelly v. Mayor*, etc., the general doctrines so well set forth in *Blake v. Ferris* were applied with entire precision and accuracy." While the learned judge doubted the propriety of the application of that doctrine to the case of *Blake v. Ferris*, he expressly recognized its correctness and its applicability to a case like this. The decision of the court in the *Storrs Case* was placed upon the sole ground that it was the duty of the corporation to keep its streets in a safe condition for public travel, and for a failure to discharge that duty the corporation was liable. The question of the negligent manner in which the work was performed was entirely excluded by the opinion in that case.

There are certain exceptional cases where a person employing a contractor is liable, which, briefly stated, are: Where the employer personally interferes with the work, and the acts performed by him occasion the injury; where the thing contracted to be done is unlawful;

where the acts performed create a public nuisance; and where an employer is bound by a statute to do a thing efficiently, and an injury results from its inefficiency. Manifestly, this case falls within none of the exceptions to which we have referred. There was no interference by the defendant. The thing contracted to be done was lawful. The work did not constitute a public nuisance, and there was no statute binding the defendant to efficiently perform it. In none of those exceptional cases does the question of negligence arise. There the action is based upon the wrongful act of the party, and may be maintained against the author or the person performing or continuing it. In the case at bar the work contracted for was lawful and necessary for the improvement and use of the defendant's property. Consequently no liability can be based upon the illegality of the transaction, but it must stand upon the negligence of the contractor or his employee alone. It seems very obvious that, under the authorities, the defendant was not responsible for the acts of the contractor or his employees, and that the court should have granted the defendant's motion for a nonsuit. If a contrary rule were established, it would not only impose upon the owners of real property an improper restraint in contracting for its improvement, but would open a new and unlimited field for actions for the negligence of others which has not hitherto existed in this state, and practically overrule a long line of decisions in this court which firmly establish a contrary doctrine. It follows that the judgment should be reversed.

PARKER, C. J., and O'BRIEN and VANN, JJ., concur with MARTIN, J., for reversal. BARTLETT and HAIGHT, JJ., concur with GRAY, J., for affirmance.

Judgment reversed, and a new trial granted, with costs to abide the event.

(On the general principle that an employer is not liable for the negligent acts of a contractor or the contractor's servants, see *Hilliard v. Richardson*, 3 Gray, 349, 63 Am. Dec. 743; *Boomer v. Wilbur*, 176 Mass. 482, 57 N. E. 1004, 53 L. R. A. 172; *Engel v. Eureka Club*, 137 N. Y. 100, 32 N. E. 1052, 33 Am. St. Rep. 692; *Burke v. Ireland*, 166 N. Y. 305, 59 N. E. 914; *Edmundson v. Pittsburg, M. & Y. R. Co.*, 111 Pa. 316, 2 Atl. 404. Nor is a contractor liable for the negligence of a sub-contractor or of the sub-contractor's servants. *Cuff v. Newark & N. Y. R. Co.*, 35 N. J. Law, 17, 10 Am. Rep. 205; *Overton v. Freeman*, 11 C. B. 867. For the exceptional cases where the employer is held liable, see as follows: [a] Where the employer retains control over the contractor in the mode of doing the work, *Corrigan v. Elsinger*, 81 Minn. 42, 83 N. W. 492; *New Orleans, M. & C. R. Co. v. Hanning*, 15 Wall. 649, 21 L. Ed. 220; *Congregation v. Smith*, 163 Pa. 561, 30 Atl. 279; [b] where the thing contracted to be done is itself a nuisance, or otherwise unlawful, *Ellis v. Sheffield Gas Co.*, 2 E. & B. 767; *St. Paul Water Co. v. Ware*, 16 Wall. 566, 21 L. Ed. 485; *Cuff v. Newark & N. Y. R. Co.*, *supra*; [c] where a contractor creates a nuisance upon the employer's premises, and after the contractor's work is completed the employer accepts the premises in that condition, and suffers the nuisance to remain, *Vogel v. City of New York*, 92 N. Y. 10, 44 Am. Rep.

349; *Khron v. Brock*, 144 Mass. 516, 11 N. E. 748; [d] where the employer is under an absolute legal duty to have a certain thing done, or done in a certain way, and entrusts its performance to a contractor who neglects or fails to perform it as required, as, e. g., where the duty is to have the public highway kept in a safe condition for travel, *Deming v. Terminal Railway*, 169 N. Y. 1, 61 N. E. 983; *Hughes v. Percival*, L. R. 8 App. Cas. 443; *City & S. R. Co. v. Moores*, 80 Md. 348, 30 Atl. 643, 45 Am. St. Rep. 345; *City of Chicago v. Robbins*, 2 Black, 418, 17 L. Ed. 298. In some jurisdictions a further exception is established, viz., [e] where a contractor is employed to do work which from its nature is likely to cause danger to others unless guarded against, the employer is liable if a person is injured because the contractor fails to take reasonable precautions against such danger. *Penny v. Wimbledon Council* [1899] 2 Q. B. 72; *Covington & C. Bridge Co. v. Steinbrock*, 61 Ohio St. 215, 55 N. E. 618, 76 Am. St. Rep. 375; *Wetherbee v. Partridge*, 175 Mass. 185, 55 N. E. 894, 78 Am. St. Rep. 486; *Woodman v. Metropolitan R. Co.*, 149 Mass. 335, 21 N. E. 482, 4 L. R. A. 213, 14 Am. St. Rep. 427.)

## VI. LIABILITY OF MASTER TO HIS SERVANT.

(99 N. Y. 368, 2 N. E. 24.)

PANTZAR v. TILLY FOSTER MIN. CO.

(Court of Appeals of New York. June 9, 1885.)

### 1. MASTER AND SERVANT—NEGLIGENCE OF VICE-PRINCIPAL.

A master must exercise reasonable care to provide for his servant suitable tools and implements, a proper place to work in, competent fellow workmen, when needed, etc., and cannot delegate the performance of these duties to a superintendent or other employee, so as to exonerate himself from liability to a servant who has been injured by their non-performance.

### 2. SAME—ASSUMPTION OF RISK OF SERVICE.

The rule that the servant takes the risk of the service presupposes that the master has performed the duties of care, caution, and vigilance which the law casts upon him.

### 3. SAME.

Plaintiff, while employed in defendant's mine in constructing a wall was injured by the fall of a mass of rock from an overhanging cliff. There was evidence, on the trial of his action to recover for such injuries, that a seam had been discovered in the cliff where the rock broke off, which defendant's superintendent had knowledge was increasing in width, that it would have been practicable to support such rock, that plaintiff had no knowledge of the danger, and that the superintendent did not take proper precautions to protect the workmen from injury from this cause. *Held*, that a verdict for plaintiff should not be disturbed.

Appeal from Supreme Court, General Term, First Department.

Action by Gustav Pantzar against the Tilly Foster Iron Mining Company for injuries alleged to have been caused by negligence of defendant. Verdict and judgment for plaintiff. On appeal to the general term the judgment was affirmed. Defendant again appealed.

RUGER, C. J. The general principles upon which this action depends have been so frequently discussed in recent cases that anything more than a brief summary would be unprofitable. Thus it has been held that a master owes the duty to his servant of furnishing adequate and suitable tools and implements for his use, a safe and proper place in which to prosecute his work, and, when they are needed, the employment of skillful and competent workmen to direct his labor and assist in the performance of his duties. *Coal Co. v. Reid*, 3 Macq. 275; *Laning v. Railroad Co.*, 49 N. Y. 522, 10 Am. Rep. 447; *Brydon v. Stewart*, 2 Macq. 34; *Booth v. Railroad Co.*, 73 N. Y. 40, 29 Am. Rep. 97. That "no duty belonging to the master to perform for the safety and protection of his servants can be delegated to any servant of any grade so as to exonerate the master from responsibility to a servant who has been injured by its non-performance." *Mann v. President, etc.*, 91 N. Y. 500; *Booth v. Railroad Co.*, supra. And that, when the general management and control of an industrial enterprise or establishment is delegated to a superintendent, with power to hire and discharge servants, to direct their labors and obtain and employ suitable means and appliances for the conduct of the business, such superintendent stands in the place of the master, and his neglect to adopt all reasonable means and precautions to provide for the safety of the employees constitutes an omission of duty on the part of the master, rendering him liable for any injury occurring to the servant therefrom. *Corcoran v. Holbrook*, 59 N. Y. 517, 17 Am. Rep. 367.

The case shows that the defendant was the owner of a coal mine in Putnam county, New York, conducted under the management of a superintendent. He was invested by them with full power of control over the same, and ample discretion and authority in directing the work, and using all suitable measures and precautions for carrying on the business of mining, and securing the safety of the workmen employed in the prosecution of the enterprise.

The action under review was brought by a servant of the defendant to recover damages for personal injuries received by him through the fall of a mass of rock, while working in a pit in which the mining operations in question were carried on. The plaintiff, at the time of the accident, was upon a wall in the course of construction for the purpose of furnishing a place behind which to deposit the refuse material of the mine, and, as claimed by defendant, also with a view of supporting the overhanging cliff from which the rock injuring plaintiff fell. At the time of the accident this wall had been raised to the height of about 60 feet, and was still some 50 feet below the surface of the ground. While thus engaged with a number of other workmen a large mass was detached, and fell from the brow of the projecting cliff under which the work was in progress, and caused the death of some, and the serious injury of others, among whom was the plaintiff.

The evidence as to the condition of the rock at the time of the accident was conflicting, and raised questions of fact peculiarly within the province of the jury to determine. On the part of the defendant it tended to show that the cliff was composed of gneiss, a mineral naturally marked by seams, joints, and foliations, and that it was in the frequent and continued habit of causing it to be examined for the purpose of discovering, if possible, appearances indicating any immediate danger, and that no such indications had been observed before the accident.

On the other hand, the plaintiff's evidence showed that a large crack parallel with, and about 10 feet back from, the upper angle of the face of the cliff had long existed and was plainly visible; that the attention of the superintendent and foreman had been called to it, and they were warned of its dangerous character; that they had instituted an experiment to determine whether it was growing or not, and that such experiment did show that it was increasing in width, and still they took no precautions to support the rock while the workmen were engaged under it, although such precautions were practicable, and frequently adopted in other mines. In some cases, braces of timbers, extending across from the side of the pit to the rock liable to fall, were used, and in others the overhanging rock had been blasted off. It was also shown that a wall such as that in process of construction would, when completed, have furnished a support to the projecting mass. The plaintiff's evidence also tended to show that the rock broke off at the place where the crack had been observed, and that with the fall the crack disappeared. It must therefore be assumed, from the verdict of the jury, that it was determined that the rock fell from a cause of which the defendant had notice, and that precautions which would have prevented the injury were not adopted, although they were practicable, and of easy and safe application.

The evidence tended to show that the wall then in course of construction was not a safe and suitable protection for the laborers engaged in working upon it. It obviously required a long time to complete it, and its main design seemed to be to furnish a place for the deposit of refuse material. During the course of its erection it certainly afforded no protection to those working below the cliff, and the jury was authorized to infer, from the fact that it was not completed after the lapse of several years, that it was not originally designed as a means of present protection from the dangers of falling rock. The degree of vigilance and care required of a master in the adoption of means of protection towards his servants has been much discussed by elementary writers, as well as in reported cases, and the conclusions reached, applicable to such a case as the present, are not disputed. To accept the rule extracted from *Leonard v. Collins*, 70 N. Y. 90, and adopted in the appellant's brief, is to inquire whether "the master did everything which, in the exercise of reasonable and ordinary care and prudence, he ought to have done." "Did he omit any precaution which a prudent and

careful man would take, or ought to have taken?" It is difficult to see how the defendant can claim exemption from liability.

But one exception was taken by the defendant in the case, and that was to the denial by the court of its motion to nonsuit at the close of the plaintiff's evidence. It might very well be said that the broad question argued before us by the learned counsel for the defendant was not properly in the case, as it was based, to some extent, upon evidence given subsequent to the taking of the exception. But as we think the judgment must, in any event, be affirmed, no injustice is done the plaintiff by considering all of the evidence taken on the trial in determining the validity of this exception.

The motion for a nonsuit was placed upon grounds stated concisely as follows: (1) That the accident causing plaintiff's injury was incident to the hazardous nature of his employment, and from a risk assumed by him on entering upon it. (2) That it did not occur through an omission on the part of the defendant or its agents to perform any duty which it owed to the plaintiff. (3) That there being no proof of the incompetency of the superintendent, when originally employed, the defendant was not liable for an accident caused through an omission of duty on his part causing injury to a fellow servant. It may be said, with reference to the ground last stated, that it is disposed of by reference to the general proposition laid down at the outset of this opinion, and the other grounds involved questions of fact upon which the evidence was quite sufficient to take the case to the jury. The motion assumes that the injury to the plaintiff occurred solely from a hazard incident to the nature of the employment, and not from a cause which could have been foreseen and guarded against by the exercise of proper care and prudence on the part of the master. This, however, was the very question which was disputed before the jury and decided by it adversely to the appellant.

The defendant's contention is based upon the evidence showing that it is the nature of gneiss rock to disintegrate and fall from time to time at unexpected intervals, through the action of the elements operating upon it; but it does not follow from this fact that the master is excused from using proper precautions to protect his workmen from danger known to the master arising from such a cause. The very fact that the material was likely to fall upon and injure the defendant's servants at unexpected times imposed upon defendant the duty of inspection, and frequent and careful examinations, and upon the discovery of any indications of danger, to adopt all suitable precautions to protect its servants from injury. The rule that the servant takes the risk of the service presupposes that the master has performed the duties of caution, care, and vigilance, which the law casts upon him. *Booth v. Railroad Co.*, *supra*. It is those risks alone which cannot be obviated by the adoption of a reasonable measure of precaution by the master that the servant assumes. It was for an omission to observe the dangerous

appearances to which the evidence shows its attention had been called, and its neglect to adopt suitable and proper means of protection, that the defendant has been held liable by the jury. The evidence tends to show that the plaintiff was ignorant of the dangerous condition of the rock, and that his duties did not call him to any place from which it could be observed. He therefore had a right to rely upon the performance of the duty owing by the master, of adopting proper and suitable measures of precaution to guard him against the consequence of any danger arising from the obviously unsafe condition of the rock, and is not justly censurable for an omission to discover the impending danger himself in time to avoid it. The master, however, had notice that the rock was in motion, and was liable to fall at any moment, and was therefore chargeable with the duty, in the exercise of reasonable care and prudence, of taking immediate steps to avoid the danger, and of warning the men working under it of the hazard to which they were exposed.

We therefore think that there was evidence sustaining the verdict of the jury, and that the judgment should be affirmed.

All concur.

Judgment affirmed.

(See also *Choctaw, O. & G. R. Co. v. McDade*, 191 U. S. 64, 24 Sup. Ct. 24, 48 L. Ed. 96; *Union Pac. R. Co. v. O'Brien*, 161 U. S. 451, 16 Sup. Ct. 618, 40 L. Ed. 766; *Northern Pac. R. Co. v. Herbert*, 116 U. S. 642, 6 Sup. Ct. 590, 29 L. Ed. 755; *Hough v. Railway Co.*, 100 U. S. 213, 25 L. Ed. 612; *Benzing v. Steinway*, 101 N. Y. 547, 5 N. E. 449; *Stringham v. Hilton*, 111 N. Y. 188, 18 N. E. 870, 1 L. R. A. 483; *Tuttle v. Railway*, 122 U. S. 189, 7 Sup. Ct. 1166, 30 L. Ed. 1114; *Hayden v. Manufacturing Co.*, 29 Conn. 548; *Yeaton v. Railroad Corp.*, 135 Mass. 418; *Washington & G. R. Co. v. McDade*, 135 U. S. 554, 10 Sup. Ct. 1044, 34 L. Ed. 235; *Rogers v. Manufacturing Co.*, 144 Mass. 198, 11 N. E. 77, 59 Am. Rep. 68; *Buzzell v. Manufacturing Co.*, 48 Me. 113, 77 Am. Dec. 212. "The question who are fellow servants, within the rule exempting the employer from the consequences of the negligence of fellow servants, is not ordinarily determined by rank or grade of service, but by the character of the service performed or acts complained of. As a general rule, those doing the work of a servant are fellow servants, whatever their grade of service; and a servant, of whatever rank, charged with the performance of the master's duty towards his servants, is, as to the discharge of that duty, a vice principal, for whose acts and neglects the master is responsible, because he has invested him with the responsibility of doing that which the master is bound to have carefully performed." *Jacques v. Great Falls Mfg. Co.*, 66 N. H. 482, 22 Atl. 552, 13 L. R. A. 824; *Hankins v. New York, L. E. & W. R. Co.*, 142 N. Y. 416, 37 N. E. 466, 25 L. R. A. 396, 40 Am. St. Rep. 616; *Moynihan v. Hills Co.*, 146 Mass. 586, 593, 16 N. E. 574, 4 Am. St. Rep. 348; *Davis v. Railroad Co.*, 55 Vt. 84, 45 Am. Rep. 590; *Union Pac. R. Co. v. Daniels*, 152 U. S. 684, 14 Sup. Ct. 756, 38 L. Ed. 507.)

(100 U. S. 213, 25 L. Ed. 612.)

HOUGH v. TEXAS & P. RY. CO. (In part).

(Supreme Court of the United States. October Term, 1879.)

1. CONTRIBUTORY NEGLIGENCE—ASSUMPTION OF RISK—PROMISE TO REPAIR.

Where a master has expressly promised to repair a defect in machinery used by a servant, the servant can recover for an injury caused thereby, within such a period of time after the promise as it would be reasonable to allow for its performance.

2. SAME.

The mere fact that an engineer used a locomotive when he knew the cowcatcher was insecurely fastened was not conclusive of want of due care on his part, where he had notified his master of the defect, and continued to use it only on assurances being given that it would be remedied.

Error to the Circuit Court of the United States for the Western District of Texas.

The facts are stated in the opinion of the court.

Mr. Justice HARLAN delivered the opinion of the Court.

Plaintiffs in error, the widow and child of W. C. Hough, deceased, seek in this action to recover against the Texas & Pacific Railway Company damages, compensatory and exemplary, on account of his death, which occurred in 1874, while he was in its employment as an engineer.

In substance, the case is this:

The evidence in behalf of the plaintiffs tended to show that the engine of which deceased had charge, coming in contact with an animal, was thrown from the track, over an embankment, whereby the whistle, fastened to the boiler, was blown or knocked out, and from the opening thus made hot water and steam issued, scalding the deceased to death; that the engine was thrown from the track because the cow-catcher or pilot was defective, and the whistle blown or knocked out because it was insecurely fastened to the boiler; that these defects were owing to the negligence of the company's master-mechanic, and of the foreman of the round-house at Marshall; that to the former was committed the exclusive management of the motive-power of defendant's line, with full control over all engineers, and with unrestricted power to employ, direct, control, and discharge them at pleasure; that all engineers were required to report for orders to those officers, and under their directions alone could engines go out upon the road; that deceased knew of the defective condition of the cow-catcher or pilot, and, having complained thereof to both the master-mechanic and foreman of the round-house, he was promised a number of times that the defect should be remedied, but such promises were not kept; that a new pilot was made, but, by reason of the negligence of those officers, it was not put on the

engine. [After discussing other questions, the court proceeds as follows:]

One other question, arising upon the instructions, and which has been discussed, with some fulness, by counsel, deserves notice at our hands. It is contended by counsel that the engineer was guilty of such contributory negligence as to prevent the plaintiffs from recovering. The instruction upon that branch of the case was misleading and erroneous.

The defect in the engine, of which the engineer had knowledge, was that which existed in the cow-catcher or pilot. It is not claimed that he was aware of the insufficient fastening of the whistle, or that the defect, if any, in that respect, was of such a character that he should have become advised of it while using the engine on the road. But he did have knowledge of the defective condition of the cow-catcher or pilot, and complained thereof to both the master-mechanic and the foreman of the round-house. They promised that it should be promptly remedied, and it may be that he continued to use the engine in the belief that the defect would be removed. The court below seem to attach no consequence to the complaint made by the engineer, followed, as it was, by explicit assurances that the defect should be remedied. According to the instructions, if the engineer used the engine with knowledge of the defect, the jury should find for the company, although he may have been justified in relying upon those assurances.

If the engineer, after discovering or recognizing the defective condition of the cow-catcher or pilot, had continued to use the engine, without giving notice thereof to the proper officers of the company, he would undoubtedly have been guilty of such contributory negligence as to bar a recovery, so far as such defect was found to have been the efficient cause of the death. He would be held, in that case, to have himself risked the dangers which might result from the use of the engine in such defective condition. But "there can be no doubt that, where a master has expressly promised to repair a defect, the servant can recover for an injury caused thereby, within such a period of time after the promise as it would be reasonable to allow for its performance, and, as we think, for an injury suffered within any period which would not preclude all reasonable expectation that the promise might be kept." *Shearman & Redf. Negligence*, sect. 96; *Conroy v. Vulcan Iron Works*, 62 Mo. 35; *Patterson v. P. & C. R. Co.*, 76 Pa. 389, 18 Am. Rep. 412; *Le Clair v. First Division of St. Paul & P. R. Co.*, 20 Minn. 9, (Gil. 1); *Brabbits v. Railway Co.*, 38 Wis. 289. "If the servant," says Mr. Cooley, in his work on Torts, 559, "having a right to abandon the service because it is dangerous, refrains from doing so in consequence of assurances that the danger shall be removed, the duty to remove the danger is manifest and imperative, and the master is not in the exercise of ordinary care unless or until he makes his assurances good. Moreover, the assurances remove all ground for the argument that the servant by continuing the employment engages to assume the risks."

And such seems to be the rule recognized in the English courts. *Holmes v. Worthington*, 2 Fos. & Fin. 533; *Holmes v. Clarke*, 6 H. & N. 937; *Clarke v. Holmes*, 7 H. & N. 937. We may add, that it was for the jury to say whether the defect in the cow-catcher or pilot was such that none but a reckless engineer, utterly careless of his safety, would have used the engine without it being removed. If, under all the circumstances, and in view of the promises to remedy the defect, the engineer was not wanting in due care in continuing to use the engine, then the company will not be excused for the omission to supply proper machinery, upon the ground of contributory negligence. That the engineer knew of the alleged defect was not, under the circumstances, and as matter of law, absolutely conclusive of want of due care on his part. *Ford v. Fitchburg R. Co.*, 110 Mass. 261, 14 Am. Rep. 598; *Laning v. New York Cent. R. Co.*, 49 N. Y. 521, 10 Am. Rep. 417.

Judgment reversed, and new trial ordered.

(This doctrine is now quite generally accepted. *Rice v. Eureka Paper Co.*, 174 N. Y. 385, 66 N. E. 979, 62 L. R. A. 611, 95 Am. St. Rep. 585 [collecting the authorities]; *Schlitz v. Pabst Brewing Co.*, 57 Minn. 303, 59 N. W. 188.)

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(5 Best & S. 570, L. R. 1 Q. B. 149.)

**MORGAN v. VALE OF NEATH RY. CO.**

(Court of Queen's Bench. July 4, 1864. Exchequer Chamber. November 27, 1865.)

**1. MASTER AND SERVANT—NEGLIGENCE OF FELLOW-SERVANT—WHO ARE FELLOW SERVANTS.**

The rule which exempts a master from liability to a servant for injury caused by the negligence of a fellow-servant applies in cases where, although the immediate object on which the one servant is employed is very dissimilar from that on which the other is employed, yet the risk of injury from the negligence of the one is so much a natural and necessary consequence of the employment which the other accepts, that it must be included in the risks which have to be considered in his wages.

**2. SAME—RAILROAD COMPANIES.**

Wherever an employment in the service of a railway company is such as necessarily to bring the person accepting it into contact with the traffic of the line, risk of injury from the carelessness of those managing the traffic is one of the risks necessarily and naturally incident to such employment, and within the rule.

**3. SAME.**

The plaintiff was in the employment of a railway company as a carpenter, to do any carpenter's work for the general purposes of the company. He was standing on a scaffolding at work on a shed close to the line of the railway, while some porters in the service of the company carelessly shifted an engine on a turn-table so that it struck a ladder supporting the scaffold, by which means the plaintiff was thrown down and injured. *Held*, on the above principle, that the company was not liable.

Rule nisi to enter verdict for plaintiff instead of a nonsuit.

Action by Morgan against the Vale of Neath Railway Company for injuries alleged to have been sustained by defendant's negligence. Plaintiff, at the time of the injury, was a carpenter in defendant's employ at weekly wages. The duties of the carpenters in the employment of the company were to perform all the carpenter's work they might be directed to do by the inspector of the line for the general purposes of the company. The court nonsuited plaintiff, but gave him leave to move to enter a verdict in his favor for an agreed sum. A rule nisi was accordingly obtained on the ground that there was no common employment, such as to exempt defendants from liability.

BLACKBURN, J. In this case the plaintiff was employed by the defendants as their servant to do work as a carpenter on their station while the railway traffic was being carried on in it by the servants of the defendants. In the course of this employment he was standing upon a scaffold which was erected near to one of the turn-tables. The servants of the defendants, who were engaged in shifting a locomotive engine, allowed it to project so far beyond the turn-table that, in turning, the end of the engine struck against a ladder which constituted one of the supports of the scaffold. The scaffold gave way in consequence, and the plaintiff was thrown off and injured. The plaintiff was nonsuited, with leave to move to enter a verdict for the plaintiff.

It must be taken to have been proved at the trial that there was negligence on the part of those shifting the engine, and no contributing negligence on the part of the plaintiff, so that the plaintiff might have maintained an action against those actually shifting the engine, and also against their masters, the defendants, unless the fact that the plaintiff was also the servant of the defendants forms a defense; and the question of law reserved must be taken to be whether the nature of the plaintiff's employment was such as to make him and the servants, by whose negligence he suffered, servants in a common employment, or, as it is sometimes called, "collaborateurs," within the rule which exempts the employer from responsibility to his servant for the consequences of the negligence of a servant in a common employment.

I am of opinion that this rule ought to be discharged, as I think that the facts bring the case within the principle of the class of cases of which *Hutchinson v. Railway Co.*, 5 Exch. 343, was the first decided in an English court, but which had previously been acted upon in America in the case of *Farwell v. Railroad Corp.*, 4 Metc. (Mass.) 49, 38 Am. Dec. 339, also printed in 3 Macq. 316. That principle I take to be that a servant, who engages for the performance of services for compensation, does, as an implied part of the contract, take upon himself, as between himself and his master, the natural risks and perils incident to the performance of such services; the presumption of law being that the compensation was adjusted accordingly, or, in other words, that these risks are con-

sidered in his wages; and that where the nature of the service is such that, as a natural incident to that service, the person undertaking it must be exposed to risk of injury from the negligence of other servants of the same employer, this risk is one of the natural perils which the servant by his contract takes upon himself as between him and his master; and consequently that he cannot recover against his master for an injury so caused, because, as is said by Shaw, C. J. in *Farwell v. Railroad Corp.*, he "does not stand towards him in the relation of a stranger, but is one whose rights are regulated by contract, expressed or implied."

If the master has, by his own personal negligence or malfeasance, enhanced the risk to which the servant is exposed beyond those natural risks of the employment which must be presumed to have been in contemplation when the employment was accepted, as, for instance, by knowingly employing incompetent servants, or supplying defective machinery, or the like, no defense founded on this principle can apply; for the servant does not, as an implied part of his contract, take upon himself any other risks than those naturally incident to the employment.

No such point, however, arises in the present case. It was not suggested that the defendants negligently employed servants to manage their traffic who were not competent to do so, nor that the turn-tables were improperly made. The one point made was that the plaintiff, who was employed to do carpenter's work on the station, was not employed in the same work as those who were employed in working the railway traffic; and it was contended that it was essential that the servants should be in a common employment, and working for a common object. I quite agree that it is necessary that their employment must be common in this sense: that the safety of one servant must, in the ordinary and natural course of things, depend on the care and skill of the others. This includes almost if not every case in which the servants are employed to do joint work, but I do not think it is limited to such cases. There are many cases where the immediate object on which the one servant is employed is very dissimilar from that on which the other is employed, and yet the risk of injury from the negligence of the one is so much a natural and necessary consequence of the employment which the other accepts that it must be included in the risks which are to be considered in his wages. I think that, whenever the employment is such as necessarily to bring the person accepting it into contact with the traffic of the line of railway, risk of injury from the carelessness of those managing that traffic is one of the risks necessarily and naturally incident to such an employment, and within the rule.

In *Hutchinson v. Railway Co.*, 5 Exch. 343, the company's servant, who went as their servant in one of their trains, was, as one of the necessary and ordinary consequences of so doing, exposed to risk of injury from the negligence of those who worked the traffic; and the judgment of the court of exchequer, that his representatives could not re-

cover against the company for his death caused by the negligence of their servants working the traffic, was on the principle I have just stated. His death was held to be caused by a want of skill, the risk of which the deceased had, as between himself and the defendant, agreed to run. I think it would be difficult to show that Hutchinson, and those who worked the train which ran into him, were engaged in any common service, in any sense of the word which would not include the present case.

In *Coal Co. v. McGuire*, 3 Macq. 300, Lord Chelmsford, C., in commenting on the cases on this subject, observes (pages 301-308) that in them "it did not become necessary to define with any great precision what was meant by the words 'common service' or 'common employment,' and perhaps it might be difficult beforehand to suggest any exact definition of them. It is necessary, however, in each particular case, to ascertain whether the servants are fellow-laborers in the same work; because, although a servant may be taken to have engaged to encounter all risks which are incident to the service which he undertakes, yet he cannot be expected to anticipate those which may happen to him on occasions foreign to his employment. Where servants, therefore, are engaged in different departments of duty, an injury committed by one servant upon the other, by carelessness or negligence in the course of his peculiar work, is not within the exception, and the master's liability attaches in that case in the same manner as if the injured servant stood in no such relation to him. There may be some nicety and difficulty in particular cases in deciding whether a common employment exists; but in general, by keeping in view what the servant must have known or expected to have been involved in the service which he undertakes, a satisfactory conclusion may be arrived at." These observations were made in a case in which the house of lords reversed the decision of the Scotch court of session, who had held that the owners of the colliery were responsible to the miners whom they employed, for the negligence of their servant employed to work the engine which drew them up, on the ground that they were not servants employed in common work. All the law lords, in delivering their opinions that the court of session were wrong in this decision, concurred in saying that there was no inflexible rule of law releasing the master from responsibility in every case where the person injured by the negligence of his servant was at the time of the injury in the same master's service; and they certainly use language which, like part of what I have cited from Lord Chelmsford's opinion, seems to point to the common object of the service as being the limit of the rule; but, as was observed by Lord Chelmsford himself with reference to the former decision, there was nothing in the nature of the case before them to call for a precise definition of the limit; it was only necessary to decide that the case before them fell within it. I think, however, the principle which I consider the true one is sufficiently indicated by Lord Chelmsford in the passage I have just quoted, and by Lord Cranworth

throughout his judgment in *Coal Co. v. Reid*, 3 Macq. 266. In *Waller v. Railway Co.*, 32 Law J. Exch. 205, Pollock, C. B., in his judgment refers to the observations thrown out by Lord Chelmsford, and the chief baron in effect says that, in order to decide the case before him, he considers what are the dangers which any servant engages to encounter, and looks at the probable dangers attendant upon entering the engagement in question. This I think the true principle, and that the difficulty is to apply it in each case.

Applying that principle to the case before them, the court of exchequer decided that a guard of a railway train had taken upon himself the risk of injury from the negligence of the servants whose duty it was to see that the rails were in good order. And, applying the same principle to the present case, I think that we ought to hold that the plaintiff, in accepting an employment to work in the station while the traffic was being carried on, and which must have brought him close to the traffic, accepted one which necessarily must have exposed him to danger from the carelessness of those conducting the traffic, and must be taken, as between himself and his employers, to have taken upon himself that risk.

COCKBURN, C. J., and MELLOR, J., concurred.

Rule discharged.

On appeal to the exchequer chamber, the following opinions were rendered:

ERLE, C. J. I am of opinion that the judgment should be affirmed. The plaintiff was employed by the railway company to do carpenter's work, and he was so employed on the line of railway, and the wrongdoers were the porters, also in the employment of the company, who, in shifting a steam-engine on a turn-table close to the shed on which the plaintiff was working, managed the business so negligently that the engine struck against the ladder which partly supported the plaintiff's scaffolding, and threw the plaintiff violently to the ground. The plaintiff and the porters were engaged in one common employment, and were doing work for the common object of their masters, viz., fitting the line for traffic. On a suggestion put by my Brother Pigott, Mr. Macnamara was driven to an answer, which (if it did not admit that it was the same thing) showed that he had difficulty in establishing any distinction whether the plaintiff were working close by, or whether he were employed on the turn-table itself. I think it can make no difference, and the rule which exempts the master from liability to a servant for injury caused by the negligence of a fellow-servant applies. The principle on which this rule was established, as applicable to the present case, is very clearly put by Blackburn, J., in the judgment, to which Mellor, J., agreed, in the court below: "There are many cases where the immediate object on which the one servant is employed is very dissimilar

from that on which the other is employed, and yet the risk of injury from the negligence of the one is so much a natural and necessary consequence of the employment which the other accepts that it must be included in the risks which are to be considered in his wages. I think that whenever the employment is such as necessarily to bring the person accepting it into contact with the traffic of the line of a railway, risk of injury from the carelessness of those managing that traffic is one of the risks necessarily and naturally incident to such an employment, and within the rule." The cases on this subject are extremely numerous, and have been closely examined, both here and in the court below, and I could not make the matter clearer by going through them. It is sufficient to say that I entirely agree with the judgment of the court below that the facts of the case bring it within the rule exempting the master from liability.

POLLOCK, C. B. I only wish to add a single sentence. It appears to me that we should be letting in a flood of litigation were we to decide the present case in favor of the plaintiff; for, if a carpenter's employment is to be distinguished from that of the porters employed by the same company, it will be sought to split up the employees in every large establishment into different departments of service, although the common object of their employment, however different, is but the furtherance of the business of the master; yet it might be said, with truth, that no two had a common immediate object. This shows that we must not refine, but look at the common object, and not at the common immediate object.

WILLES, BYLES, and KEATING, JJ., and BRAMWELL, CHANNELL, and PIGOTT, BB., concurred.

Judgment affirmed.

(An excellent statement of the rule is made in *McAndrews v. Burns*, 39 N. J. Law, 117, as follows: "A master is not liable to a servant for the negligence of a fellow servant, while the two are engaged in the same common employment, unless for negligence in the selection of the servant at fault, or in retaining him after notice of his incompetency. A fellow servant is any one who serves and is controlled by the same master. Common employment is service of such kind that, in the exercise of ordinary sagacity, all who engage in it may be able to foresee, when accepting it, that through the negligence of fellow servants it may probably expose them to injury." See also *Holden v. Fitchburg R. Co.*, 129 Mass. 268, 37 Am. Rep. 343; *Harrison v. Central R. Co.*, 31 N. J. Law, 293; *Norfolk & W. R. Co. v. Nuckol's Adm'r*, 91 Va. 193, 21 S. E. 342; *Toledo, W. & W. R. Co. v. Black*, 88 Ill. 112; *State v. Malster*, 57 Md. 287; *Sweeney v. Berlin Co.*, 101 N. Y. 520, 5 N. E. 358, 54 Am. Rep. 722. The rule applies though one servant is superior in grade to the other. Thus, where a common laborer on a railroad was injured by a collision caused by the negligence of other employees of the company, roadmaster, foreman of a gang of laborers, conductor, etc., they were all held to be fellow servants of the laborer, and the company was held not liable. *Martin v. Atchison, T. & S. F. R. Co.*, 166 U. S. 399, 17 Sup. Ct. 603, 41 L. Ed. 1051. To the same effect are

Northern Pac. R. Co. v. Peterson, 162 U. S. 346, 16 Sup. Ct. 843, 40 L. Ed. 994; Keenan v. New York, L. E. & W. R. Co., 145 N. Y. 190, 39 N. E. 711, 45 Am. St. Rep. 604; Moody v. Hamilton Mfg. Co., 159 Mass. 70, 34 N. E. 185, 38 Am. St. Rep. 396; O'Brien v. American Dredging Co., 53 N. J. Law, 291, 21 Atl. 324; Spancake v. Philadelphia & R. R. Co., 148 Pa. 184, 23 Atl. 1006, 33 Am. St. Rep. 821. In some states, however, there are decisions to the contrary. Northern Pac. R. Co. v. Hambly, 154 U. S. 349, 14 Sup. Ct. 983, 38 L. Ed. 1009, giving authorities on both sides of this question.)

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## INJURY CAUSING DEATH.

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(95 U. S. 754, 24 L. Ed. 580.)

MOBILE LIFE INS. CO. v. BRAME.

(Supreme Court of United States. January 21, 1878.)

### 1. DEATH—GROUND OF ACTION FOR DAMAGES.

At common law an act causing the death of a human being, though clearly involving pecuniary loss, is not the ground of an action for damages. Modern statutes, however, in England and generally in the states of this country, authorize an action in such a case, to be brought by relatives of the decedent, or his personal representatives.

### 2. SAME—RE MOTENESS OF DAMAGE.

An insurance company has no right of action, either by common law or under such a statute, against the person who feloniously or negligently causes the death of a person insured by it, for the loss thereby caused the company, such loss being too remote and indirect.

Error to the Circuit Court of the United States for the District of Louisiana.

Action by the Mobile Life Insurance Company against Samuel D. Brame to recover the sum of \$7,000, the alleged loss sustained by plaintiff in the death of one Craven McLemore, willfully killed by defendant. The plaintiff had insured the life of McLemore, and its payment of such insurance was the alleged loss to plaintiff. Defendant's demurrer to the petition was sustained, and thereupon plaintiff sued out a writ of error.

HUNT, J. The argument of the insurance company is that the killing of the deceased was an injury to or violation of a legal right or interest of the company; that, as a consequence thereof, it sustained a loss, which is the proximate effect of the injury. The answer of the defendant is founded upon the theory that the loss is the remote and indirect result merely of the act charged; that at the common law no civil action lies for an injury which results in the death of the party injured; and that the statutes of Louisiana upon

that subject do not include the present case. The authorities are so numerous and so uniform to the proposition that, by the common law, no civil action lies for an injury which results in death, that it is impossible to speak of it as a proposition open to question. It has been so decided in many cases in the English courts, and in many of the state courts, and no deliberate, well-considered decision to the contrary is to be found. In Hilliard on Torts (page 87, § 10) the rule is thus laid down: "Upon a similar ground it has been held that at common law the death of a human being, though clearly involving pecuniary loss, is not the ground of an action for damages." The most of the cases upon the subject are there referred to. *Baker v. Bolton*, 1 Camp. 493; *Connecticut Mut. Life Ins. Co. v. New York & N. H. R. Co.*, 25 Conn. 265, 65 Am. Dec. 571; *Kramer v. Railroad Co.*, 25 Cal. 434; *Railroad Co. v. Keely's Adm'r*, 23 Ind. 133; *Hyatt v. Adams*, 16 Mich. 180; *Shields v. Yonge*, 15 Ga. 349, 60 Am. Dec. 698; *Insurance Co. v. Frost*, 37 Ill. 333. The only cases that tend to the contrary of this rule, so far as we know, are *Cross v. Guthery*, 2 Root, 90, 1 Am. Dec. 61; *Plummer v. Webb*, 1 Ware, 79, Fed. Cas. No. 11,234; and *Ford v. Monroe*, 20 Wend. 210. They are considered by the New York Court of Appeals in *Green v. Railroad Co.*, \*41 N. Y. 294, 2 Abb. Dec. 277, and compared with the many cases to the contrary, and are held not to diminish the force of the rule as above stated. In that case the plaintiff alleged that on the 9th day of January, 1856, his wife was a passenger on the defendants' road, and by the gross carelessness and unskillfulness of the defendants a collision occurred, by means of which his wife was killed, "whereby he has lost and been deprived of all the comfort, benefit, and assistance of his said wife in his domestic affairs, which he might and otherwise would have had, to his damage," etc. A demurrer to this complaint, upon the ground that the facts alleged constituted no cause of action, was sustained by the New York Court of Appeals. In *Hubgh v. Railroad Co.*, 6 La. Ann. 495, 54 Am. Dec. 565, the same principle was decided, and in the same manner. In giving its opinion, the court say: "The exception of the defendants presents the question whether the death of a human being can be the ground of an action for damages." Not being satisfied with this decision, Messrs. Ogden & Duncan asked for a rehearing, the argument for which is reported in the same volume, pp. 498-508, 54 Am. Dec. 565. It was denied in an elaborate opinion by Chief Justice Eustis. In *Hermann v. Railroad Co.*, 11 La. Ann. 5, this principle was again affirmed in an opinion by Chief Justice Merrick. It is only necessary to refer to one other case, involving the same principle as those already cited, but in its facts more closely resembling the case under consideration. In *Connecticut Mut. Life Ins. Co. v. New York & N. H. R. Co.*, *supra*, the declaration alleged that on the 20th day of March, 1850, the plaintiffs had outstanding and in force

a policy of insurance for \$2,000 upon the life of Samuel Beach; that Beach was on that day a passenger on the defendants' road; that the defendants so carelessly, negligently, and unskillfully conducted themselves that the train on which Beach was riding was thrown down a bank into the river; that Beach was greatly wounded and bruised, by means whereof he then and there died, by reason of which the plaintiffs were compelled to pay to his administrators the sum of \$2,000 upon the said policy.

The allegation of the present plaintiffs is that Brame tortiously and illegally took the life of McLemore by shooting him. This is open to the inference that the act of Brame was felonious. The case in Connecticut is based upon the allegation of negligence and carelessness, and is the more favorable to a recovery, in that it avoids the suggestion existing in the present case, that the civil injury is merged in the felony. The Supreme Court of Connecticut held that the action could not be sustained. We have cited and given references to the important cases on this question; they are substantially uniform against the right of recovery. Upon principle we think no other conclusion could be reached than that stated. The relation between the insurance company and McLemore, the deceased, was created by a contract between them, to which Brame was not a party. The injury inflicted by him was upon McLemore, against his personal rights; that it happened to injure the plaintiff was an incidental circumstance, a remote and indirect result, not necessarily or legitimately resulting from the act of killing. As in *Insurance Co. v. Bosher*, 39 Me. 253, 63 Am. Dec. 618, where an insurance company brought suit against one who had willfully fired a store upon which it had a policy of insurance, which it was thereby compelled to pay, it was held that the loss was remote and indirect, and that the action could not be sustained. In *Ashley v. Dixon*, 48 N. Y. 430, 8 Am. Rep. 559, it was held that if A is under a contract to convey his land to B, and C persuades him not to do so, no action lies by B. against C. So a witness is not liable for evidence given by him in a suit, although false, by which another is injured. *Grove v. Brandenburg*, 7 Blackf. 234; *Dunlap v. Glidden*, 31 Me. 435, 52 Am. Dec. 625. And in *Anthony v. Slaid*, 11 Metc. (Mass.) 290, a contractor for the support of town paupers had been subjected to extra expense in consequence of personal injury inflicted upon one of them, and he brought the action against the assailant to recover for such expenditure. The court held the damage to be remote and indirect, and not sustained by means of any natural or legal relation between the plaintiff and the party injured, but simply by means of a special contract between the plaintiff and the town. Some text-writers are referred to as holding a different view, but we are not cited to any case in this country or Great Britain where a different doctrine has been held.

By the common law, actions for injuries to the person abate by death, and cannot be revived or maintained by the executor or the heir. By the act of parliament of August 26, 1846, (9 & 10 Vict.,) an action in certain cases is given to the representatives of the deceased. This principle, in various forms and with various limitations, has been incorporated into the statutes of many of our states, and, among others, into that of Louisiana. It is there given in favor of the minor children and widow of the deceased, and, in default of these relatives, in favor of the surviving father and mother. Acts La. 1855, No. 223, p. 270. The case of a creditor, much less a remote claimant like the plaintiff, is not within the statute.

In each of the briefs it is stated that the defendant was tried for the homicide, and acquitted. In the view we take of the case, the fact of a trial or its result is a circumstance quite immaterial to the present question, however important it may have been to defendant.

Judgment affirmed.

(See also *The Harrisburg*, 119 U. S. 199, 7 Sup. Ct. 140, 30 L. Ed. 358; *Wyatt v. Williams*, 43 N. H. 102; *Carey v. Railroad Co.*, 1 Cush. 475, 48 Am. Dec. 616; *Stuber v. McEntee*, 142 N. Y. 200, 36 N. E. 878; *Snedeker v. Snedeker*, 164 N. Y. 58, 58 N. E. 4; *Bowes v. City of Boston*, 155 Mass. 344, 29 N. E. 633, 15 L. R. A. 365.)

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## FRAUD AND DECEIT.

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### I. ELEMENTS OF ACTION—FRAUDULENT INTENT.

#### 1. English rule.

(L. R. 14 App. Cas. 337.)

*DERRY et al. v. PEEK* (in part).

(House of Lords. July 1, 1889.)

#### 1. FRAUD—WHEN ACTION OF DECEIT LIES.

To support an action of deceit to recover damages, plaintiff must prove actual fraud. Fraud is proved when it is shown that a false representation has been made knowingly, or without belief in its truth, or recklessly, without caring whether it be true or false.

#### 2. SAME.

A false statement, made through carelessness and without reasonable ground for believing it to be true, may be evidence of fraud, but does not necessarily amount to fraud. Such a statement, if made in the honest belief that it is true, is not fraudulent, and does not render the person making it liable to an action of deceit.

### 8. SAME—PROSPECTUS OF COMPANY.

A special act incorporating a tramway company provided that the cars might be moved by animal power, and, with the consent of the board of trade, by steam power. The directors issued a prospectus, containing a statement that by their charter the company had the right to use steam power instead of horses. Plaintiff took shares on the faith of such statement. The board of trade afterwards refused their consent to the use of steam, and the company was wound up. *Held*, in an action of deceit against the directors founded upon the false statement, that defendants were not liable, the statement as to steam power having been made by them in the honest belief that it was true.

### Appeal from Court of Appeal.

Action on the case brought by Sir Henry William Peek against William Derry, chairman, and J. C. Wakefield, M. M. Moore, J. Pethwick, and S. J. Wilde, four of the directors of the Plymouth, Devonport & District Tramways Company, for damages for alleged fraudulent misrepresentations of defendants whereby plaintiff was induced to take shares in the company. The company was incorporated in 1882 by special act, (45 & 46 Vict. c. 159,) which provided, *inter alia*, that the cars used on the tramways might be moved by animal power, and, with the consent of the board of trade, by steam or any mechanical power, for fixed periods, and subject to the regulation of the board. The tramways act of 1870 (33 & 34 Vict. c. 78) provides that all cars used on any tramway shall be moved by the power prescribed by the special act, and, where no such power is prescribed, by animal power only. In 1883 the defendants, as directors of the company, issued a prospectus containing the following paragraph: "One great feature of the undertaking, to which considerable importance should be attached, is that, by the special act of parliament obtained, the company has the right to use steam or mechanical motive power, instead of horses; and it is fully expected that, by means of this, a considerable saving will result in the working expenses of the line, as compared with other tramways worked by horses." Plaintiff, relying upon the representation of the right of the company to use steam or mechanical power, took shares in the company. Subsequently the board of trade refused to consent to the use of steam or other mechanical power, except on certain portions of the tramways, the result of which was that the company was wound up. Plaintiff brought this action of deceit. At the trial, before Stirling, J., the action was dismissed; but, on appeal to the court of appeal, the decision below was reversed. Defendants appealed from the judgment of the court of appeal.

**LORD HERSCHELL.** My lords, in the statement of claim in this action the respondent, who is the plaintiff, alleges that the appellants made, in a prospectus issued by them, certain statements which were untrue; that they well knew that the facts were not as stated

in the prospectus, and made the representations fraudulently, and with the view to induce the plaintiff to take shares in the company. "This action is one which is commonly called an action of 'deceit,' a mere common-law action." This is the description of it given by Cotton, L. J., in delivering judgment. I think it important that it should be borne in mind that such an action differs essentially from one brought to obtain rescission of a contract on the ground of misrepresentation of a material fact. The principles which govern the two actions differ widely. Where rescission is claimed it is only necessary to prove that there was misrepresentation. Then, however honestly it may have been made, however free from blame the person who made it, the contract, having been obtained by misrepresentation, cannot stand. In an action of deceit, on the contrary, it is not enough to establish misrepresentation alone. It is conceded on all hands that something more must be proved to cast liability upon the defendant, though it has been a matter of controversy what additional elements are requisite. I lay stress upon this, because observations made by learned judges in actions for rescission have been cited, and much relied upon at the bar by counsel for the respondent. Care must obviously be observed in applying the language used in relation to such actions to an action of deceit. Even if the scope of the language used extend beyond the particular action which was being dealt with, it must be remembered that the learned judges were not engaged in determining what is necessary to support an action of deceit, or in discriminating with nicety the elements which enter into it.

In the court of appeal Sir James Hannen says: "I take the law to be that if a man takes upon himself to assert a thing to be true which he does not know to be true, and has no reasonable ground to believe to be true, in order to induce another to act upon the assertion, who does so act, and is thereby damnified, the person so damnified is entitled to maintain an action for deceit." Again, Lopes, L. J., states what, in his opinion, is the result of the cases. I will not trouble your lordships with quoting the first three propositions which he lays down, although I do not feel sure that the third is distinct from, and not rather an instance of, the case dealt with by the second proposition. But he says that a person making a false statement, intended to be in fact relied on by the person to whom it is made, may be sued by the person damaged thereby, "fourthly, if it is untrue in fact, but believed to be true, but without any reasonable ground for such belief."

It will thus be seen that the learned judges concurred in thinking that it was sufficient to prove that the representations made were not in accordance with fact, and that the person making them had no reasonable ground for believing them. They did not treat the absence of such reasonable ground as evidence merely that the state-

ments were made recklessly, careless whether they were true or false, and without belief that they were true; but they adopted as the test of liability, not the existence of belief in the truth of the assertions made, but whether the belief in them was founded upon any reasonable grounds. It will be seen, further, that the court did not purport to be establishing any new doctrine. They deemed that they were only following the cases already decided, and that the proposition which they concurred in laying down was established by prior authorities. Indeed, Lopes, L. J., expressly states the law in this respect to be well settled. This renders a close and critical examination of the earlier authorities necessary.

I need go no further back than the leading case of *Pasley v. Freeman*, 2 Smith, Lead. Cas. 94. If it was not there for the first time held that an action of deceit would lie in respect of fraudulent representations against a person not a party to a contract induced by them, the law was, at all events, not so well settled but that a distinguished judge, Grose, J., differing from his brethren on the bench, held that such an action was not maintainable. Buller, J., who held that the action lay, adopted in relation to it the language of Croke, J., in *Baily v. Merrell*, 3 Bulst. 95, who said: "Fraud without damage, or damage without fraud, gives no cause of action, but where these two do concur, \* \* \* an action lies." In reviewing the case of *Crosse v. Gardner*, Carth. 90, he says: "Knowledge of the falsehood of the thing asserted is fraud and deceit;" and, further, after pointing out that in *Risney v. Selby*, 1 Salk. 211, the judgment proceeded wholly on the ground that the defendant knew what he asserted to be false, he adds: "The assertion alone will not maintain the action, but the plaintiff must go on to prove that it was false, and that the defendant knew it to be so;" the latter words being specially emphasized. Kenyon, C. J., said: "The plaintiffs applied to the defendant, telling him that they were going to deal with Falch, and desired to be informed of his credit, when the defendant fraudulently, and knowing it to be otherwise, and with a design to deceive the plaintiffs, made the false affirmation stated on the record, by which they sustained damage. Can a doubt be entertained for a moment but that this is injurious to the plaintiffs?" In this case it was evidently considered that fraud was the basis of the action, and that such fraud might consist in making a statement known to be false. *Haycraft v. Creasy*, 2 East, 92, was again an action in respect of a false affirmation made by the defendant to the plaintiff about the credit of a third party whom the plaintiff was about to trust. The words complained of were: "I can assure you of my own knowledge that you may credit Miss R. to any amount with perfect safety." All the judges were agreed that fraud was of the essence of the action, but they differed in their view of the conclusion to be drawn from the facts. Lord Kenyon thought that fraud had been proved, be-

cause the defendant stated that to be true within his own knowledge which he did not know to be true. The other judges, thinking that the defendant's words vouching his own knowledge were no more than a strong expression of opinion, inasmuch as a statement concerning the credit of another can be no more than a matter of opinion, and that he did believe the lady's credit to be what he represented, held that the action would not lie. It is beside the present purpose to inquire which view of the facts was the more sound. Upon the law there was no difference of opinion. It is a distinct decision that knowledge of the falsity of the affirmation made is essential to the maintenance of the action, and that belief in its truth affords a defense.

I may pass now to *Foster v. Charles*, 7 Bing. 105. It was there contended that the defendant was not liable, even though the representation he made was false to his knowledge, because he had no intention of defrauding or injuring the plaintiff. This contention was not upheld by the court, Tindal, C. J., saying: "It is a fraud in law if a party makes representations which he knows to be false, and injury ensues, although the motives from which the representations proceeded may not have been bad." This is the first of the cases in which I have met with the expression "fraud in law." It was manifestly used in relation to the argument that the defendant was not actuated by a desire to defraud or injure the person to whom the representation was made. The popular use of the word "fraud" perhaps involves generally the conception of such a motive as one of its elements. But I do not think the chief justice intended to indicate any doubt that the act which he characterized as a fraud in law was in truth fraudulent as a matter of fact also. Willfully to tell a falsehood, intending that another shall be led to act upon it as if it were the truth, may well be termed fraudulent, whatever the motive which induces it, though it be neither gain to the person making the assertion nor injury to the person to whom it is made.

*Foster v. Charles*, 7 Bing. 105, was followed in *Corbett v. Brown*, 8 Bing. 33, and shortly afterwards in *Polhill v. Walter*, 3 Barn. & Adol. 114. The learned counsel for the respondent placed great reliance on this case, because, although the jury had negatived the existence of fraud in fact, the defendant was nevertheless held liable. It is plain, however, that all that was meant by this finding of the jury was that the defendant was not actuated by any corrupt or improper motive, for Lord Tenterden says: "It was contended that, \* \* \* in order to maintain this species of action, it is not necessary to prove that the false representation was made from a corrupt motive of gain to the defendant or a wicked motive of injury to the plaintiff. It was said to be enough if a representation is made which the party making it knows to be untrue, and which is intended by him, or which from the mode in which it is made is calculated, to in-

duce another to act on the faith of it in such a way as that he may incur damage, and that damage is actually incurred. A willful falsehood of such a nature was contended to be, in the legal sense of the word, a fraud, and for this position was cited *Foster v. Charles*, 7 Bing. 105, to which may be added the recent case of *Corbett v. Brown*, 8 Bing. 33. The principle of these cases appears to be well founded, and to apply to the present."

In a later case of *Crawshay v. Thompson*, 4 Man. & G. 357, Maule, J., explains *Polhill v. Walter*, 3 Barn. & Adol. 114, thus: "If a wrong be done by a false representation of a party who knows such representation to be false, the law will infer an intention to injure. That is the effect of *Polhill v. Walter*." In the same case, Cresswell, J., defines "fraud in law" in terms which have been often quoted. "The cases," he says, "may be considered to establish the principle that fraud in law consists in knowingly asserting that which is false in fact to the injury of another."

In *Moens v. Heyworth*, 10 Mees. & W. 157, which was decided in the same year as *Crawshay v. Thompson*, 4 Man. & G. 357, Lord Abinger having suggested that an action of fraud might be maintained where no moral blame was to be imputed, Parke, B., said: "To support that count [viz., a count for fraudulent representation] it was essential to prove that the defendants, knowingly, [and I observe that this word is emphasized,] by words or acts, made such a representation as is stated in the third count, relative to the invoice of these goods, as they knew to be untrue."

The next case in the series (*Taylor v. Ashton*, 11 Mees. & W. 401) is one which strikes me as being of great importance. It was an action brought against directors of a bank for fraudulent representations as to its affairs, whereby the plaintiff was induced to take shares. The jury found the defendants not guilty of fraud, but expressed the opinion that they had been guilty of gross negligence. Exception was taken to the mode in which the case was left to the jury, and it was contended that their verdict was sufficient to render the defendants liable. Parke, B., however, in delivering the opinion of the court, said: "It is insisted that even that, [viz., the gross negligence which the jury had found,] accompanied with a damage to the plaintiff in consequence of that gross negligence, would be sufficient to give him a right of action. From this proposition we entirely dissent, because we are of opinion that, independently of any contract between the parties, no one can be made responsible for a representation of this kind unless it be fraudulently made. \* \* \*

But then it was said that, in order to constitute that fraud, it was not necessary to show that the defendants knew the fact they stated to be untrue; that it was enough that the fact was untrue, if they communicated that fact for a deceitful purpose; and to that proposition the court is prepared to assent. It is not necessary to show that the

defendants knew the facts to be untrue; if they stated a fact which was untrue for a fraudulent purpose, they at the same time not believing that fact to be true, in that case it would be both a legal and moral fraud."

Now, it is impossible to conceive a more emphatic declaration than this: that, to support an action of deceit, fraud must be proved, and that nothing less than fraud will do. I can find no trace of the idea that it would suffice if it were shown that the defendants had not reasonable grounds for believing the statements they made. It is difficult to understand how the defendants could, in the case on which I am commenting, have been guilty of gross negligence in making the statements they did, if they had reasonable grounds for believing them to be true, or if they had taken care that they had reasonable grounds for making them.

All the cases I have hitherto referred to were in courts of first instance. But in *Evans v. Collins*, 5 Q. B. 804, 820, they were reviewed by the exchequer chamber. The judgment of the court was delivered by Tindal, C. J. After stating the question at issue to be "whether a statement or representation which is false in fact, but not known to be so by the party making it, but, on the contrary, made honestly, and in the full belief that it is true, affords a ground of action," he proceeds to say: "The current of the authorities, from *Pasley v. Freeman*, 2 Smith, Lead. Cas. 94, downwards, has laid down the general rule of law to be that fraud must concur with the false statement in order to give a ground of action." Is it not clear that the court considered that fraud was absent, if the statement was "made honestly, and in the full belief that it was true?"

In *Evans v. Edmonds*, 13 C. B. 777, Maule, J., expressed an important opinion, often quoted, which has been thought to carry the law further than the previous authorities, though I do not think it really does so. He said: "If a man having no knowledge whatever on the subject takes upon himself to represent a certain state of facts to exist, he does so at his peril, and if it be done either with a view to secure some benefit to himself, or to deceive a third person, he is in law guilty of a fraud, for he takes upon himself to warrant his own belief of the truth of that which he so asserts. Although the person making the representation may have no knowledge of its falsehood, the representation may still have been fraudulently made." The foundation of this proposition manifestly is that a person making any statement which he intends another to act upon must be taken to warrant his belief in its truth. Any person making such a statement must always be aware that the person to whom it is made will understand, if not that he who makes it knows, yet at least that he believes, it to be true; and, if he has no such belief, he is as much guilty of fraud as if he had made any other representation which he knew to be false or did not believe to be true.

I now arrive at the earliest case in which I find the suggestion that an untrue statement, made without reasonable ground for believing it, will support an action for deceit. In *Bank v. Addie*, L. R. 1 H. L. Sc. 145, 162, the lord president told the jury "that, if a case should occur of directors taking upon themselves to put forth in their report statements of importance in regard to the affairs of the bank, false in themselves, and which they did not believe, or had no reasonable ground to believe, to be true, that would be a misrepresentation and deceit." Exceptions having been taken to this direction without avail in the court of sessions, Lord Chelmsford, in this house, said: "I agree in the propriety of this interlocutor. In the argument upon this exception the case was put of an honest belief being entertained by the directors of the reasonableness of which it was said the jury, upon this direction, would have to judge. But supposing a person makes an untrue statement, which he asserts to be the result of a bona fide belief in its truth, how can the bona fides be tested except by considering the grounds of such belief? And if an untrue statement is made founded upon a belief which is destitute of all reasonable grounds, or which the least inquiry would immediately correct, I do not see that it is not fairly and correctly characterized as misrepresentation and deceit." I think there is here some confusion between that which is evidence of fraud and that which constitutes it. A consideration of the grounds of belief is no doubt an important aid in ascertaining whether the belief was really entertained. A man's mere assertion that he believed the statement he made to be true is not accepted as conclusive proof that he did so. There may be such an absence of reasonable ground for his belief as, in spite of his assertion, to carry conviction to the mind that he had not really the belief which he alleges. If the learned lord intended to go further, as apparently he did, and to say that, though the belief was really entertained, yet, if there were no reasonable grounds for it, the person making the statement was guilty of fraud in the same way as if he had known what he stated to be false, I say, with all respect, that the previous authorities afford no warrant for the view that an action of deceit would lie under such circumstances. A man who forms his belief carelessly, or is unreasonably credulous, may be blameworthy when he makes a representation on which another is to act; but he is not, in my opinion, "fraudulent" in the sense in which that word was used in all the cases from *Pasley v. Freeman*, 2 Smith, Lead. Cas. 94, down to that with which I am now dealing. Even when the expression "fraud in law" has been employed, there has always been present, and regarded as an essential element, that the deception was willful, either because the untrue statement was known to be untrue, or because belief in it was asserted without such belief existing. I have made these remarks with the more confidence because they appear to me to have the high sanction of Lord

Cranworth. In delivering his opinion in the same case he said: "I confess that my opinion was that in what his lordship [the lord president] thus stated he went beyond what principle warrants. If persons in the situation of directors of a bank make statements as to the condition of its affairs which they bona fide believe to be true, I cannot think they can be guilty of fraud because other persons think, or the court thinks, or your lordships think, that there was no sufficient ground to warrant the opinion which they had formed. If a little more care and caution must have led the directors to a conclusion different from that which they put forth, this may afford strong evidence to show that they did not really believe in the truth of what they stated, and so that they were guilty of fraud. But this would be the consequence, not of their having stated as true what they had not reasonable ground to believe to be true, but of their having stated as true what they did not believe to be true." Sir James Hannen, in his judgment below, seeks to limit the application of what Lord Cranworth says to cases where the statement made is a matter of opinion only. With all deference, I do not think it was intended to be or can be so limited. The direction which he was considering, and which he thought went beyond what true principle warranted, had relation to making false statements of importance in regard to the affairs of the bank. When this is borne in mind, and the words which follow those quoted by Sir James Hannen are looked at, it becomes to my mind obvious that Lord Cranworth did not use the words, "the opinion which they had formed," as meaning anything different from "the belief which they entertained."

The opinions expressed by Lord Cairns in a well-known case have been cited as though they supported the view that an action of deceit might be maintained without any fraud on the part of the person sued. I do not think that they bear any such construction. In the case of *Mining Co. v. Smith*, L. R. 4 H. L. 64, 79, he said: "If persons take upon themselves to make assertions as to which they are ignorant whether they are true or untrue, they must, in a civil point of view, be held as responsible as if they had asserted that which they knew to be untrue." This must mean that the persons referred to were conscious, when making the assertion, that they were ignorant whether it was true or untrue; for, if not, it might be said of any one who innocently makes a false statement. He must be ignorant that it is untrue, for otherwise he would not make it innocently. He must be ignorant that it is true, for by the hypothesis it is false. Construing the language of Lord Cairns in the sense I have indicated, it is no more than an adoption of the opinion expressed by Maule, J., in *Evans v. Edmonds*, 13 C. B. 777. It is a case of the representation of a person's belief in a fact when he is conscious that he knows not whether it be true or false, and when he has therefore no such belief. When Lord Cairns speaks of it as not being fraud in the more invidious sense, he refers,

I think, only to the fact that there was no intention to cheat or injure.

I come now to very recent cases. In *Weir v. Bell*, 3 Exch. Div. 238, Lord Bramwell vigorously criticised the expression "legal fraud," and indicated a very decided opinion that an action founded on fraud could not be sustained except by the proof of fraud in fact. I have already given my reasons for thinking that, until recent times, at all events, the judges who spoke of fraud in law did not mean to exclude the existence of fraud in fact, but only of an intention to defraud or injure.

In the same case Cotton, L. J., stated the law in much the same way as he did in the present case, treating "recklessly" as equivalent to "without any reasonable ground for believing" the statements made. But the same learned judge, in *Arkwright v. Newbold*, 17 Ch. Div. 301, laid down the law somewhat differently, for he said: "In an action of deceit the representation to found the action must not be innocent; that is to say, it must be made either with knowledge of its being false, or with a reckless disregard as to whether it is or is not true." And his exposition of the law was substantially the same in *Edgington v. Fitzmaurice*, 29 Ch. Div. 459. In this latter case Bowen, L. J., defined what the plaintiff must prove in addition to the falsity of the statement, as "secondly, that it was false to the knowledge of the defendants, or that they made it not caring whether it was true or false."

It only remains to notice the case of *Smith v. Chadwick*, 20 Ch. Div. 27, 44, 67. The late master of the rolls there said: "A man may issue a prospectus or make any other statement to induce another to enter into a contract, believing that his statement is true, and not intending to deceive; but he may through carelessness have made statements which are not true, and which he ought to have known were not true, and if he does so he is liable in an action for deceit. He cannot be allowed to escape merely because he had good intentions, and did not intend to defraud." This, like everything else that fell from that learned judge, is worthy of respectful consideration. With the last sentence I quite agree, but I cannot assent to the doctrine that a false statement made through carelessness, and which ought to have been known to be untrue, of itself renders the person who makes it liable to an action for deceit. This does not seem to me by any means necessarily to amount to fraud, without which the action will not, in my opinion, lie.

It must be remembered that it was not requisite for Sir George Jessel in *Smith v. Chadwick*, 20 Ch. Div. 27, 44, 67, to form an opinion whether a statement carelessly made, but honestly believed, could be the foundation of an action of deceit. The decision did not turn on any such point. The conclusion at which he arrived is expressed in these terms: "On the whole, I have come to the conclusion that

this, although in some respects inaccurate, and in some respects not altogether free from imputation of carelessness, was a fair, honest, and bona fide statement on the part of the defendants, and by no means exposes them to an action for deceit." I may further note that in the same case Lindley, L. J., said: "The plaintiff has to prove—First, that the misrepresentation was made to him; secondly, he must prove that it was false; thirdly, that it was false to the knowledge of the defendants, or, at all events, that they did not believe the truth of it." This appears to be a different statement of the law from that which I have just criticised, and one much more in accord with the prior decisions.

The case of *Smith v. Chadwick* was carried to your lordships' house. L. R. 9 App. Cas. 187, 190. Lord Selborne thus laid down the law: "I conceive that, in an action of deceit, it is the duty of the plaintiff to establish two things: First, actual fraud, which is to be judged of by the nature and character of the representations made, considered with reference to the object for which they were made, the knowledge or means of knowledge of the person making them, and the intention which the law justly imputes to every man to produce those consequences which are the natural result of his acts; and, secondly, he must establish that this fraud was an inducing cause to the contract." It will be noticed that the noble and learned lord regards the proof of actual fraud as essential. All the other matters to which he refers are elements to be considered in determining whether such fraud has been established. Lord Blackburn indicated that, although he nearly agreed with the master of the rolls, the learned judge had not quite stated what he conceived to be the law. He did not point out precisely how far he differed, but it is impossible to read his judgment in this case, or in that of *Brownlie v. Campbell*, L. R. 5 App. Cas. 925, without seeing that in his opinion proof of actual fraud or of a willful deception was requisite.

Having now drawn attention, I believe, to all the cases having a material bearing upon the question under consideration, I proceed to state briefly the conclusions to which I have been led. I think the authorities establish the following propositions: First. In order to sustain an action of deceit, there must be proof of fraud, and nothing short of that will suffice. Secondly. Fraud is proved when it is shown that a false representation has been made (1) knowingly, or (2) without belief in its truth, or (3) recklessly, careless whether it be true or false. Although I have treated the second and third as distinct cases, I think the third is but an instance of the second; for one who makes a statement under such circumstances can have no real belief in the truth of what he states. To prevent a false statement being fraudulent, there must, I think, always be an honest belief in its truth. And this probably covers the whole ground, for one who knowingly alleges that which is false has obviously no such hon-

est belief. Thirdly. If fraud be proved, the motive of the person guilty of it is immaterial. It matters not that there was no intention to cheat or injure the person to whom the statement was made.

I think these propositions embrace all that can be supported by decided cases from the time of *Pasley v. Freeman*, 2 Smith, Lead. Cas. 94, down to *Bank v. Addie*, L. R. 1 H. L. Sc. 145, in 1867, when the first suggestion is to be found that belief in the truth of what he has stated will not suffice to absolve the defendant if his belief be based on no reasonable grounds. I have shown that this view was at once dissented from by Lord Cranworth, so that there was at the outset as much authority against it as for it. And I have met with no further assertion of Lord Chelmsford's view until the case of *Weir v. Bell*, 3 Exch. Div. 238, where it seems to be involved in Lord Justice Cotton's enunciation of the law of deceit. But no reason is there given in support of the view; it is treated as established law. The dictum of the late master of the rolls that a false statement, made through carelessness, which the person making it ought to have known to be untrue, would sustain an action of deceit, carried the matter still further. But that such an action could be maintained notwithstanding an honest belief that the statement made was true, if there were no reasonable grounds for the belief, was, I think, for the first time decided in the case now under appeal.

In my opinion, making a false statement through want of care falls far short of, and is a very different thing from, fraud, and the same may be said of a false representation honestly believed, though on insufficient grounds. The whole current of authorities, with which I have so long detained your lordships, shows to my mind conclusively that fraud is essential to found an action of deceit, and that it cannot be maintained where the acts proved cannot properly be so termed.

At the same time I desire to say distinctly that, when a false statement has been made, the questions whether there were reasonable grounds for believing it, and what were the means of knowledge in the possession of the person making it, are most weighty matters for consideration. The ground upon which an alleged belief was founded is a most important test of its reality. I can conceive many cases where the fact that an alleged belief was destitute of all reasonable foundation would suffice of itself to convince the court that it was not really entertained, and that the representation was a fraudulent one. So, too, although means of knowledge are, as was pointed out by Lord Blackburn in *Brownlie v. Campbell*, L. R. 5 App. Cas. 925, a very different thing from knowledge, if I thought that a person making a false statement had shut his eyes to the facts, or purposely abstained from inquiring into them, I should hold that honest belief was absent, and that he was just as fraudulent as if he had knowingly stated that which was false.

I have arrived with some reluctance at the conclusion to which I have felt myself compelled, for I think those who put before the public a prospectus to induce them to embark their money in a commercial enterprise ought to be vigilant to see that it contains such representations only as are in strict accordance with fact, and I should be very unwilling to give any countenance to the contrary idea. I think there is much to be said for the view that this moral duty ought to some extent to be converted into a legal obligation, and that the want of reasonable care to see that statements made under such circumstances are true should be made an actionable wrong. But this is not a matter fit for discussion on the present occasion. If it is to be done, the legislature must intervene, and expressly give a right of action in respect of such a departure from duty.<sup>1</sup> It ought not, I think, to be done by straining the law, and holding that to be fraudulent which the tribunal feels cannot properly be so described. I think mischief is likely to result from blurring the distinction between carelessness and fraud, and equally holding a man fraudulent whether his acts can or cannot be justly so designated.

It now remains for me to apply what I believe to be the law to the facts of the present case. The charge against the defendants is that they fraudulently represented that, by the special act of parliament which the company had obtained, they had a right to use steam or other mechanical power instead of horses. The test which I purpose employing is to inquire whether the defendants knowingly made a false statement in this respect, or whether, on the contrary, they honestly believed what they stated to be a true and fair representation of the facts. Before considering whether the charge of fraud is proved, I may say that I approach the case of all the defendants, except Wilde, with the inclination to scrutinize their conduct with severity. They most improperly received sums of money from the promoters, and this unquestionably lays them open to the suspicion of being ready to put before the public whatever was desired by those who were promoting the undertaking. But I think this must not be unduly pressed, and when I find that the statement impeached was concurred in by one whose conduct in the respect I have mentioned was free from blame, and who was under no similar pressure, the case assumes, I think, a different complexion. I must further remark that the learned judge who tried the cause, and who tells us that he care-

<sup>1</sup> Since this decision was rendered, an act of Parliament has been passed to get rid of the effect of it, so far as directors and promoters issuing a prospectus on the one hand, and persons taking shares and debentures on the other hand, are concerned. In such cases the plaintiff has only to prove, in addition to damage, that a material statement of fact is untrue, and he can maintain an action, unless the defendant can establish that he had reasonable ground to believe, and did believe, the statement to be true. *McConnell v. Wright* [1903] 1 Ch. 546, 558. In other classes of cases, however, the decision in *Derry v. Peek* remains applicable.

fully watched the demeanor of the witnesses and scanned their evidence, came without hesitation to the conclusion that they were witnesses of truth, and that their evidence, whatever may be its effect, might safely be relied on. An opinion so formed ought not to be differed from except on very clear grounds, and, after carefully considering the evidence, I see no reason to dissent from Stirling, J.'s, conclusion. I shall therefore assume the truth of their testimony.

I agree with the court below that the statement made did not accurately convey to the mind of a person reading it what the rights of the company were, but, to judge whether it may nevertheless have been put forward without subjecting the defendants to the imputation of fraud, your lordships must consider what were the circumstances. By the general tramways act of 1870 it is provided that all carriages used on any tramway shall be moved by the power prescribed by the special act, and, where no such power is prescribed, by animal power only. 33 & 34 Vict. c. 78, § 34. In order, therefore, to enable the company to use steam-power, an act of parliament had to be obtained empowering its use. This had been done, but the power was clogged with the condition that it was only to be used with the consent of the board of trade. It was therefore incorrect to say that the company had the right to use steam. They would only have that right if they obtained the consent of the board of trade. But it is impossible not to see that the fact which would impress itself upon the minds of those connected with the company was that they had, after submitting the plans to the board of trade, obtained a special act empowering the use of steam. It might well be that the fact that the consent of the board of trade was necessary would not dwell in the same way upon their minds, if they thought that the consent of the board would be obtained as a matter of course if its requirements were complied with, and that it was therefore a mere question of expenditure and care. The provision might seem to them analogous to that contained in the general tramways act, and I believe in the railways act also, prohibiting the line being opened until it had been inspected by the board of trade, and certified fit for traffic, which no one would regard as a condition practically limiting the right to use the line for the purpose of a tramway or railway. I do not say that the two cases are strictly analogous in point of law, but they may well have been thought so by business men.

I turn, now, to the evidence of the defendants. I will take first that of Mr. Wilde, whose conduct in relation to the promotion of the company is free from suspicion. He is a member of the bar, and a director of one of the London tramway companies. He states that he was aware that the consent of the board of trade was necessary, but that he thought that such consent had been practically given, inasmuch as, pursuant to the standing orders, the plans had been laid before the board of trade, with the statement that it was intended

to use mechanical as well as horse power, and no objection having been raised by the board of trade, and the bill obtained, he took it for granted that no objection would be raised afterwards, provided the works were properly carried out. He considered, therefore, that, practically and substantially, they had the right to use steam, and that the statement was perfectly true. Mr. Pethick's evidence is to much the same effect. He thought the board of trade had no more right to refuse their consent than they would in the case of a railway; that they might have required additions or alterations; but that, on any reasonable requirements being complied with, they could not refuse their consent. It never entered his thoughts that, after the board had passed their plans, with the knowledge that it was proposed to use steam, they would refuse their consent. Mr. Moore states that he was under the impression that the passage in the prospectus represented the effect of section 35 of the act, inasmuch as he understood that the consent was obtained. He so understood from the statement made at the board by the solicitors to the company, to the general effect that everything was in order for the use of steam, that the act had been obtained subject to the usual restrictions, and that they were starting as a tramway company, with full power to use steam as other companies were doing. Mr. Wakefield, according to his evidence, believed that the statement in the prospectus was fair; he never had a doubt about it. It never occurred to him to say anything about the consent of the board of trade, because, as they had got the act of parliament for steam, he presumed at once that they would get it. Mr. Derry's evidence is somewhat confused, but I think the fair effect of it is that, though he was aware that under the act the consent of the board of trade was necessary, he thought that, the company having obtained their act, the board's consent would follow as a matter of course, and that the question of such consent being necessary never crossed his mind at the time the prospectus was issued. He believed at that time that it was correct to say they had the right to use steam.

As I have said, Stirling, J., gave credit to these witnesses, and I see no reason to differ from him. What conclusion ought to be drawn from their evidence? I think they were mistaken in supposing that the consent of the board of trade would follow as a matter of course, because they had obtained their act. It was absolutely in the discretion of the board whether such consent should be given. The prospectus was therefore inaccurate. But that is not the question. If they believed that the consent of the board of trade was practically concluded by the passing of the act, has the plaintiff made out, which it was for him to do, that they have been guilty of a fraudulent misrepresentation? I think not. I cannot hold it proved as to any one of them that he knowingly made a false statement, or one which he did not believe to be true, or was careless whether what he

stated was true or false. In short, I think they honestly believed that what they asserted was true, and I am of opinion that the charge of fraud made against them has not been established. It is not unworthy of note that, in his report to the board of trade, Gen. Hutchinson, who was obviously aware of the provisions of the special act, falls into the very same inaccuracy of language as is complained of in the defendants, for he says: "The act of 1882 gives the company authority to use mechanical power over all their system." I quite admit that the statements of witnesses as to their belief are by no means to be accepted blindfold. The probabilities must be considered. Whenever it is necessary to arrive at a conclusion as to the state of mind of another person, and to determine whether his belief under given circumstances was such as he alleges, we can only do so by applying the standard of conduct which our own experience of the ways of men has enabled us to form,—by asking ourselves whether a reasonable man would be likely, under the circumstances, so to believe. I have applied this test. With that I have a strong conviction that a reasonable man, situated as the defendants were, with their knowledge and means of knowledge, might well believe what they state they did believe, and consider that the representation made was substantially true. Adopting the language of Jessel, M. R., in *Smith v. Chadwick*, 20 Ch. Div. 67, I conclude by saying that, on the whole, I have come to the conclusion that the statement, "though in some respects inaccurate and not altogether free from imputation of carelessness, was a fair, honest, and bona fide statement on the part of the defendants, and by no means exposes them to an action for deceit." I think the judgment of the court of appeal should be reversed.

Order of the court of appeal reversed; order of Stirling, J., restored; the respondent to pay to the appellants their costs below and in this house; cause remitted to the chancery division.

(There is general agreement among the American authorities in support of the preliminary propositions laid down by Lord Herschell in the above case. viz., that "fraud is proved when it is shown that a false representation has been made [1] knowingly, or [2] without belief in its truth, or [3] recklessly, careless whether it be true or false." *Cooper v. Schlesinger*, 111 U. S. 148, 4 Sup. Ct. 360, 28 L. Ed. 382; *Kountze v. Kennedy*, 147 N. Y. 124, 41 N. E. 414, 29 L. R. A. 360, 49 Am. St. Rep. 651; *Brackett v. Griswold*, 112 N. Y. 454, 20 N. E. 376; *Cooley on Torts* [2d Ed.] 582-587. Various forms of stating the rule as to liability may properly be deemed to come under one or the other of these heads. A common form of statement is this: "A person who makes representations of material facts, assuming or intending to convey the impression that he has actual knowledge of the existence of such facts, when he is conscious that he has no such knowledge, is as much responsible for the injurious consequences of such representations to one who believes and acts upon them as if he had actual knowledge of their falsity." *Lehigh Zinc & Iron Co. v. Bamford*, 150 U. S. 665, 14 Sup. Ct. 219, 37 L. Ed. 1215; *Marsh v. Falker*, 40 N. Y. 562; *Powell v. Linde Co.*, 58 App. Div. 261, 68 N. Y. Supp. 1070, affirmed 171 N. Y. 675, 64 N. E. 1125; *Caldwell v. Henry*, 76 Mo. 254;

*Cabot v. Christle*, 42 Vt. 121, 1 Am. Rep. 313; *Cowley v. Smyth*, 46 N. J. Law, 380, 50 Am. Rep. 432. But in cases like *Derry v. Peek*, ante, page 626, where the person making the false statement has a bona fide belief that it is true, but his belief is formed carelessly or without reasonable grounds, the American cases are not in accord as to whether this constitutes fraud. In New York it is held that "where a party represents a material fact to be true to his personal knowledge, as distinguished from belief or opinion, when he does not know whether it is true or not, and it is actually untrue, he is guilty of falsehood, *even if he believes it to be true*; and if the statement is thus made with the intention that it shall be acted upon by another, who does so act upon it to his injury, the result is actionable fraud" [*Haddock v. Osmer*, 153 N. Y. 604, 47 N. E. 923; cf. *Cabot v. Christle*, 42 Vt. 121, 1 Am. Rep. 313]; but if a person's belief in the truth of the statement made by him be based upon reasonable grounds, no fraud is committed [*Kountze v. Kennedy*, 147 N. Y. 124, 133, 41 N. E. 414, 29 L. R. A. 360, 49 Am. St. Rep. 651]. In Pennsylvania it is declared that a person cannot be "convicted of fraud because he entertained a belief which was not well founded. Whether he had a belief, and honestly expressed it, was in issue, but the reasonableness of his ground for that belief could not be called into question." *Lamberton v. Dunham*, 165 Pa. 129, 30 Atl. 716; *Cox v. Highley*, 100 Pa. 249; but see *Erle City Iron Works v. Barber*, 106 Pa. 125, 51 Am. Rep. 508. In New Jersey it is held that there can be no fraud without moral delinquency; in other words, that there is no actual fraud which is not also moral fraud [*Crowell v. Jackson*, 53 N. J. Law, 656, 23 Atl. 426]; and that, where the statement is concerning a matter not susceptible of exact knowledge, as, e. g., with regard to the credit and solvency of a third person, the question is wholly one of good or bad faith, and that the person making the statement is not liable, if he acted in good faith and in the honest belief that it was true [*Cowley v. Smyth*, 46 N. J. Law, 380, 50 Am. Rep. 432]. In Iowa it is held that to prove fraud it is not enough to show that the representations were made "through mistake, ignorance, or carelessness, or without reason to believe that they were true." *Boddy v. Henry*, 113 Iowa, 462, 85 N. W. 771; *Mentzer v. Sargeant*, 115 Iowa, 527, 88 N. W. 1068. In Michigan, on the contrary, "it is immaterial whether a false representation is made innocently or fraudulently, if by its means the party to whom it is made is injured. *Totten v. Burhans*, 91 Mich. 495, 51 N. W. 1119. In some other states, also, false statements have been held actionable if they were made without reasonable grounds to believe them to be true. *Trimble v. Reid*, 97 Ky. 713, 31 S. W. 861; *Rowell v. Chase*, 61 N. H. 135; *Ramsey v. Wallace*, 100 N. C. 75, 6 S. E. 638. As to the law of Massachusetts and various other states, see the next case and the note thereto.)

## 2. Massachusetts rule.

(117 Mass. 195.)

LITCHFIELD v. HUTCHINSON.

(Supreme Judicial Court of Massachusetts. February 1, 1875.)

### FRAUD—WHEN ACTION OF DECEIT LIES.

To sustain an action of deceit to recover damages, it is not always necessary to prove that the defendant knew that the facts stated by him were false. If he states, as of his own knowledge, material facts sus-

ceptible of knowledge, which are false, it is a fraud which renders him liable to the party who relies and acts upon the statement as true, and it is no defense that he believed the facts to be true.

Exceptions from Superior Court, Middlesex County.

Action of tort brought by Paul F. Litchfield against Nathaniel Hutchinson for deceit in the sale of a horse. A verdict was returned for defendant. Plaintiff alleged exceptions.

MORTON, J. This is an action of tort in which the plaintiff alleges that he was induced to buy a horse of the defendant by representations made by him that the horse was sound, and that the horse was, in fact, unsound and lame, all of which the defendant well knew. To sustain such an action, it is necessary for the plaintiff to prove that the defendant made false representations, which were material, with a view to induce the plaintiff to purchase, and that the plaintiff was thereby induced to purchase. But it is not always necessary to prove that the defendant knew that the facts stated by him were false. If he states, as of his own knowledge, material facts susceptible of knowledge, which are false, it is a fraud which renders him liable to the party who relies and acts upon the statement as true, and it is no defense that he believed the facts to be true. The falsity and fraud consist in representing that he knows the facts to be true, of his own knowledge, when he has no such knowledge. Page v. Bent, 2 Metc. (Mass.) 371; Stone v. Denny, 4 Metc. (Mass.) 151; Milliken v. Thorndike, 103 Mass. 382; Fisher v. Mellen, Id. 503.

In the case at bar the plaintiff asked the court to instruct the jury "that if the defendant made a representation of the soundness of the horse, as of his own knowledge, and the jury are satisfied that he might have known by reasonable inquiry and examination whether he was sound or not, and the horse was not sound as a matter of fact, and if the plaintiff relied on such representations, and was induced thereby to purchase the horse, and thereby sustained damage, then the defendant is liable." We are of opinion that this instruction should have been given in substance. If the defect in the horse was one which might have been known by reasonable examination, it was a matter susceptible of knowledge; and a representation by the defendant, made as of his knowledge, that such defect did not exist, would, if false, be a fraud for which he would be liable to the plaintiff, if made with a view to induce him to purchase, and if relied on by him. A false representation of this character is sufficiently set forth in the declaration to constitute a cause of action, without the further allegation that the defendant well knew the representations to be false. It is not necessary that all the allegations should be proved if enough are proved to make out a cause of action. The instructions given upon the subject embraced in this prayer required the plaintiff to prove, not only that the defendant made the false rep-

representations alleged, as of his own knowledge, but also that the defendant knew that they were false, or that he did not honestly believe them to be true. In this respect the instructions were erroneous.

### Exceptions sustained.

(I have called this the "Massachusetts rule," and placed it in contrast with the "English rule," because in England honest belief in the truth of the statement made, without previous inquiry to ascertain its truth, is declared not to be fraud [see *Angus v. Clifford* (1891) 2 Ch. 449], while by this Massachusetts case and various others "it is no defense" that the one making the statement "believed it to be true," the matter being "susceptible of knowledge" [*Chatham Furnace Co. v. Moffatt*, 147 Mass. 403, 18 N. E. 163, 9 Am. St. Rep. 727, citing many cases]. But in *Nash v. Minnesota Title Ins. Co.*, 163 Mass. 574, 40 N. E. 1039, 28 L. R. A. 753, 47 Am. St. Rep. 489, *Derry v. Peek*, ante, p. 626, is considered, and it is said: "By the law of England mere ignorance, or negligence, or stupidity on the part of the person making the representations does not constitute fraud if he intends honestly to tell the truth, although his statements, understood according to their seeming meaning, may be ever so misleading. In this particular the decisions of this commonwealth are of similar import." In a later decision, however, the same court declares: "If a statement of a fact which is susceptible of actual knowledge is made as of one's own knowledge, and is false, it may be made a foundation of an action for deceit without further proof of an actual intent to deceive." *Weeks v. Currier*, 172 Mass. 53, 51 N. E. 416. Laying such stress on the words "susceptible of knowledge" certainly implies that as to matters of this kind one must be free from negligence, and carefully investigate and learn the truth before making the representation. In Iowa this doctrine has been criticised as follows: "To hold that defendant, in an action of deceit, is liable for false statements, the falsity of which he might have known by investigation, but which he in fact believed to be true, is to put a liability on one for what he says in good faith, under circumstances not making it his duty to make any statement whatever. If liability in such cases is to be predicated on the question whether the party making the representation might have known of its falsity, then the greatest uncertainty must result as to how much opportunity for knowledge is necessary to render him liable." *Boddy v. Henry*, 113 Iowa, 462, 85 N. W. 771, 53 L. R. A. 769.

This so-called Massachusetts doctrine has been adopted in a number of the states. *Kirkpatrick v. Reeves*, 121 Ind. 280, 22 N. E. 139; *Bullitt v. Farrar*, 42 Minn. 8, 43 N. W. 566, 6 L. R. A. 149, 18 Am. St. Rep. 485; *Davis v. Nuzum*, 72 Wis. 439, 40 N. W. 497, 1 L. R. A. 774; *Montreal River Lumber Co. v. Mihills*, 80 Wis. 540, 50 N. W. 507; *Rowell v. Chase*, 61 N. H. 135; cf. *Cowley v. Smyth*, 46 N. J. Law, 380, 50 Am. Rep. 432.

To make a man liable for fraud, it is not necessary that he should have been actuated by a motive of gain for himself, or of injury to the plaintiff [*Cowley v. Smyth*, 46 N. J. Law, 380, 50 Am. Rep. 432]; nor need he have derived any benefit from his act [*New York Land Imp. Co. v. Chapman*, 118 N. Y. 288, 23 N. E. 187; *Hindman v. First Nat. Bank*, 112 Fed. 931, 50 C. C. A. 623, 57 L. R. A. 108; *Leonard v. Springer*, 197 Ill. 532, 64 N. E. 299].)

## II. FRAUD BY SILENCE.

(94 Mo. 423, 7 S. W. 421.)

GRIGSBY v. STAPLETON.

(Supreme Court of Missouri. March 5, 1888.)

**SALE—FRAUDULENT CONCEALMENT OF LATENT DEFECT—CAVEAT EMPTOR.**

Plaintiff sold cattle to defendant at a sound price, knowing that they had Texas fever, and that some of them had died from the disease. Defendant did not know that they were diseased, nor that any had died. Texas fever is a disease not easily detected, except by those acquainted with it. *Held*, a fraudulent concealment by plaintiff of a latent defect, and that the doctrine of caveat emptor did not apply.

Appeal from Circuit Court, Nodaway County; H. S. Kelley, Judge.

Suit by Francis J. Grigsby against James Stapleton. Judgment for plaintiff, and, after motion for a new trial, defendant appeals.

BLACK, J. This was a suit in two counts. The first declares for the contract price of 100 head of cattle sold by the plaintiff to the defendant; the second seeks to recover the value of the same cattle. The contract price, as well as the value, is alleged to have been \$3,431.25. The answer is—First, a general denial; second, fraudulent representation as to the health and condition of the cattle; third, fraudulent concealment of the fact that they had the Spanish or Texas fever; fourth, tender of their value in their diseased condition. Plaintiff purchased 105 head of cattle at the stock-yards in Kansas City on Friday, the 25th of July, 1884, at \$3.60 per cwt. He shipped them to Barnard on Saturday. Mr. Ray, plaintiff's agent, attended to the shipment, and accompanied the cattle. Ray says it was reported in the yards, before he left Kansas City, that the cattle were sick with Texas fever; some persons said they were sick, and some said they were not. When the cattle arrived at Barnard, Ray told the plaintiff of the report, and that the cattle were in bad condition; that one died in the yards at Kansas City, before loading, and another died in the cars on the way. On Sunday morning the plaintiff started with them to his home. After driving them a mile or so, he says he concluded to and did drive them back to the yards, because they were wild. One of them died on this drive, and two more died in the pen at Barnard before the sale to defendant. There is much evidence tending to show that plaintiff drove the cattle back, because he was afraid to take them to his neighborhood, and that he knew they were diseased, and dying from the fever. He made no disclosure of the fact that the cattle were sick to defendant, nor that they were reported to have the fever. Defendant bargained for the cattle on Sunday afternoon, and on Monday morning completed the contract at \$3.75 per cwt.,

and at once shipped them to Chicago. Thirty died on the way; twenty were condemned by the health officer. It is shown beyond all question that they all had the Texas fever. The court, by the first instruction given at the request of the plaintiff, told the jury that if "plaintiff made no representations to defendant as to the health or condition of said cattle to influence defendant to believe said cattle were sound or in healthy condition, but, on the contrary, defendant bought said cattle on actual view of the same, and relying on his own judgment as to their health and condition, then the jury will find for plaintiff; \* \* \* and, if the cattle were bought by the defendant in the manner above stated, it makes no difference whether said cattle, or any of them, were, at the time of said sale, affected with Texas fever or other disease, or whether plaintiff did or did not know of their being so diseased, as, under such circumstances, he would buy at his own risk and peril."

Caveat emptor is the general rule of the common law. If defects in the property sold are patent, and might be discovered by the exercise of ordinary attention, and the buyer has an opportunity to inspect the property, the law does not require the vendor to point out defects. But there are cases where it becomes the duty of the seller to point out and disclose latent defects. Parsons says the rule seems to be that a concealment or misrepresentation as to extrinsic facts which affect the market value of the things sold is not fraudulent, while the same concealment of defects in the articles themselves would be fraudulent. 2 Pars. Cont. (6th Ed.) 775. When an article is sold for a particular purpose, the suppression of a fact by the vendor, which fact makes the article unfit for the purpose for which it was sold, is a deceit; and, as a general rule, a material latent defect must be disclosed when the article is offered for sale, or the sale will be avoided. 1 Whart. Cont. § 248. The sale of animals which the seller knows, but the purchaser does not, have a contagious disease, should be regarded as a fraud, when the fact of the disease is not disclosed. Cooley, Torts, 481. Kerr says: "Defects, however, which are latent, or circumstances materially affecting the subject-matter of a sale, of which the purchaser has no means, or at least has no equal means, of knowledge, must, if known to the seller, be disclosed." Kerr, Fraud & M. (Ed. by Bump,) 101. In *Cardwell v. McClelland*, 3 Sneed, 150, the action was for fraud in the sale of an unsound horse. The court had instructed that if the buyer relies upon his own judgment and observations, and the seller makes no representations that are untrue, or says nothing, the buyer takes the property at his own risk. This instruction was held to be erroneous, the court saying, "If the seller knows of a latent defect in the property that could not be discovered by a man of ordinary observation, he is bound to disclose it." In *Jeffrey v. Bigelow*, 13 Wend. 518, 28 Am. Dec. 476, the defendants, through their agent, sold a flock of sheep to the plaintiff.

Soon after the sale a disease known as the "scab" made its appearance among the sheep. It was in substance said, had the defendants made the sale in person, and known the sheep were diseased, it would have been their duty to have informed the purchaser; and the defendants were held liable for the deceit. In the case of *McAdams v. Cates*, 24 Mo. 223, the plaintiff made an exchange or swap for a filly, unsound from loss of her teeth. The court, after a careful review of the authorities as they then stood, announced this conclusion: "If the defect complained of in the present case was unknown to the plaintiff, and of such a character that he would not have made the exchange had he known of it, and was a latent defect such as would have ordinarily escaped the observation of men engaged in buying horses, and the defendant, knowing this, allowed the plaintiff to exchange without communicating the defect, he was guilty of a fraudulent concealment, and must answer for it accordingly." This case was followed, and the principle reasserted, in *Barron v. Alexander*, 27 Mo. 530. *Hill v. Balls*, 2 Hurl. & N. 299, seems to teach a different doctrine; but the cases in this court, supported as they are, must be taken as the established law of this state.

There is no claim in this case that defendant knew these cattle were diseased. It seems to be conceded on all hands that Texas fever is a disease not easily detected, except by those having had experience with it. The cattle were sold to the defendant at a sound price. If, therefore, plaintiff knew they had the Texas fever, or any other disease materially affecting their value upon the market, and did not disclose the same to the defendant, he was guilty of fraudulent concealment of a latent defect. It is not necessary to this defense that there should be any warranty or representations as to the health or condition of the cattle. Indeed, so far as this case is concerned, if the cattle had been pronounced by some of the cattle-men to have the Texas fever, and, after knowledge of that report came to plaintiff, some of them to his knowledge died from sickness, then he should have disclosed these facts to the defendant. They were circumstances materially affecting the value of the cattle for the purposes for which they were bought, or for any other purpose, and of which defendant, on all the evidence, had no equal means of knowledge. To withhold these circumstances was a deceit, in the absence of proof that defendant possessed such information. It follows that the first instruction is radically wrong, and that the second, given at the request of the plaintiff, is equally vicious. The judgment is reversed, and the cause remanded.

RAY, J., absent. The other judges concur.

(The following cases are to the same effect: *Maynard v. Maynard*, 49 Vt. 297; *French v. Vining*, 102 Mass. 132, 3 Am. Rep. 440; *Downing v. Dearborn*, 77 Me. 457, 1 Atl. 407; *Dowling v. Lawrence*, 58 Wis. 282, 16 N. W. 552;

*Stewart v. Rancho Co.*, 128 U. S. 383, 9 Sup. Ct. 101, 32 L. Ed. 439; *Hanson v. Edgerly*, 29 N. H. 343; cf. *Thomas v. Murphy*, 87 Minn. 358, 91 N. W. 1097. But some cases are to the contrary: *Paul v. Hadley*, 23 Barb. 521; *Decker v. Fredericks*, 47 N. J. Law, 469, 1 Atl. 470; see *Hadley v. Clinton Importing Co.*, 13 Ohio St. 502, 82 Am. Dec. 454. It is a general rule that silence does not constitute actionable fraud, unless there be a legal duty to make disclosure. *Wood v. Amory*, 105 N. Y. 278, 11 N. E. 636. But concealment of defects by acts and artifices calculated to deceive is actual fraud, just as much as are positive false statements. *Croyle v. Moses*, 90 Pa. 250, 35 Am. Rep. 654.

In sales of goods the maxim *caveat emptor* is applied, and "unless there be some misrepresentation or artifice to disguise the thing sold, or some warranty as to its character or quality, the vendee is bound by the sale, notwithstanding the existence of intrinsic defects and vices known to the vendor and unknown to the vendee materially affecting its value. \* \* \* But the rule of *caveat emptor* is applied with certain restrictions, and is not permitted to obtain in a case where it is plain it was the duty of the vendor to acquaint the vendee with a material fact known to the former and unknown to the latter. It has been held that it is the duty of one who is about to sell a flock of sheep to inform the intending purchaser of the fact, if it be known to the vendor, of a highly contagious disease among the sheep to be sold, and that it is a fraudulent suppression of a material fact if it be knowingly concealed." *Rothmiller v. Stein*, 143 N. Y. 581, 591, 38 N. E. 718, 720, 721, 26 L. R. A. 148 [stating also other classes of cases in which silence amounts to fraud]. That *caveat emptor* does not apply when fraud is committed, see also *Stewart v. Stearns*, 63 N. H. 99, 56 Am. Rep. 496; *Lee v. Tarplin*, 183 Mass. 52, 66 N. E. 431; *Burroughs v. Pacific Guano Co.*, 81 Ala. 255, 1 South. 212. In Maine and Massachusetts, however, such great latitude is allowed to "dealer's talk" in sales of property that the rule *caveat emptor* has often been applied when the vendor, indulging in such "talk," has made statements which he knew to be false. *Gordon v. Parmelee*, 2 Allen, 212; *Deming v. Darling*, 148 Mass. 504, 20 N. E. 107, 2 L. R. A. 743; *Palmer v. Bell*, 85 Me. 352, 27 Atl. 250; see the note to *Long v. Warren*, post, 661.)

### III. FALSE STATEMENTS AS TO MATTERS OF OPINION.

(102 N. Y. 454, 7 N. E. 321, 55 Am. Rep. 824.)

HICKEY v. MORRELL.

(Court of Appeals of New York. June 1, 1886.)

**WAREHOUSEMAN — FALSE REPRESENTATIONS THAT WAREHOUSE WAS FIRE-PROOF.**

A warehouseman, in a circular soliciting patrons, stated that in his warehouse no expense had been spared in supplying "protection against the spread of fire, the exterior being fire-proof," etc. Portions of the exterior of the building were in fact constructed of wood. *Held*, that such statement was the statement of a matter of fact, not the mere expression of an opinion; and, if made by the warehouseman with knowledge of the component parts of his building, and with intent to deceive, a person who was induced thereby to deliver, for storage in the warehouse, property which was destroyed by fire communicated to such wooden portions of the structure, was entitled to recover from the warehouseman for the loss so incurred.

Appeal from Court of Common Pleas of the City and County of New York, General Term.

Action by Teresa H. Hickey against John H. Morrell for alleged false representations by defendant. The complaint was dismissed at the trial, and the judgment for defendant entered thereon was affirmed by the general term on appeal. 12 Daly, 482. From the judgment of the general term plaintiff again appealed.

DANFORTH, J. As to the character of this action the parties are agreed. It is for "falsely and fraudulently," and "with an intent to deceive and defraud the plaintiff," representing, among other things, that the defendant's warehouse was "fire-proof on the exterior," whereby the plaintiff was induced to deliver to him, to be stored therein, certain property of value, which, while there, was destroyed by fire communicated from the outside "to the wooden cornice and wooden window-frames" of the warehouse, and thence to the property in question. The answer admitted that defendant was proprietor of the warehouse; that it and the articles described in the complaint were destroyed by fire; but denied the other matters above referred to as making out a cause of action, and set up that "the property was received and stored by him as a warehouseman, and in no other capacity, and under the special contract that the goods were stored at the owner's risk of fire."

There was no controversy as to the evidence. The question was determined upon that introduced by the plaintiff, and in view of the law as it stood at the time of the bailment. The appellant refers to the statute (Laws 1871, c. 742, § 8) "in relation to storage, and other purposes," imposing liabilities upon persons for any fire resulting from their willful and culpable negligence, and which, among other things, requires "the closing of iron shutters" at the completion of the business of each day, by the occupant of the building having use or control of the same; but the complaint contains no allegation of negligence, and so the action could not stand on that ground either at common law or by statute. Another statute, also referred to, relating to buildings in the city of New York, (Laws 1874, c. 547, § 5,) is of some importance in its bearing upon the point chiefly pressed upon us, and as likely to have been in contemplation of both parties. It is there provided that buildings of a certain description—within which the storehouse in question comes—shall have doors and blinds and shutters made of fire-proof metal on every window and opening above the first story.

The plaintiff's testimony went to show that she was induced to store her goods with the defendant by representations contained in a circular issued by him, the object of which, as therein stated, was to call "the special attention of persons having valuable articles, merchandise, or other property for storage to his new first-class storage

warehouse, in the erection of which," it is said, among other things, "no expense has been spared in supplying light, ventilation, and protection against the spread of fire; the exterior being fire-proof, and the interior being divided off by heavy brick walls, iron doors, and railings, appropriate and convenient in every way for the various kinds of articles to be stored."

The learned counsel for the respondent argues that the only statements of fact in the paragraph quoted are those which relate to the interior as divided by heavy brick walls, iron doors, and railings; that as to those the defendant had knowledge; and concedes that their non-existence would make him guilty of a misrepresentation. This is a very narrow view of the subject, and could prevail, if at all, only by conceding that the defendant purposely avoided mention of those things which, if stated, would make his solicitations less attractive, and display him as the owner of a building combustible on the outside, and so of little security to its contents if they happened to be of the same character.

We think the appellant's ground of complaint a just one. It was proven that in fact the window-frames in the warehouse were of wood; that at the outside of the windows there were no shutters; that the cornices were of wood, covered with tin. The fire occurred in the evening. It originated in other buildings across the street, and from them communicated to the wooden window-frames on the defendant's building. An architect and a builder, examined as experts, testified that a building constructed, as was the one in question, "with wooden window-frames and sashes, and no outside shutters," could not be deemed fire-proof, and that in October, 1881, it was practicable to erect a storage warehouse which would be fire-proof on the exterior. At the close of the plaintiff's evidence she was nonsuited, upon the ground that the statement in the circular, as to the character of the exterior of the building, was a mere expression of an opinion, and not the statement of a fact. Upon the same ground the judgment was affirmed at the general term. In such a circular, obviously intended as an advertisement, high coloring and exaggeration as to the advantages offered must be expected and allowed for; but, when the author descends to matters of description and affirmation, no misstatement of any material fact can be permitted, except at the risk of making compensation to whomsoever, in reliance upon it, suffers injury. Here the allegation is that the exterior of the building is fire-proof. It necessarily refers to the quality of the material out of which it is constructed, or which forms its exposed surface. To say of any article it is fire-proof conveys no other idea than that the material out of which it is formed is incombustible. That statement, as regards certain well-known substances usually employed in the construction of buildings, while it might in some final sense be deemed the expression of an opinion, could in practical affairs be

properly regarded only as a representation of a fact. To say of a building that it is fire-proof excludes the idea that it is of wood, and necessarily implies that it is of some substance fitted for the erection of fire-proof buildings. To say of a certain portion of a building it is fire-proof suggests a comparison between that portion and other parts of the building not so characterized, and warrants the conclusion that it is of a different material. In regard to such a matter of common knowledge, the statement is more than the expression of opinion. No one would have any reason to suspect that any two persons could differ in regard to it. But when we look at the words accompanying this statement, viz., "No expense has been spared in supplying protection against the spread of fire," all possibility of doubt seems removed. This danger is pointed out as the one thing which, more than another, the owner had in view and guarded against; and the rest of the sentence shows with what result, viz., "the exterior being fire-proof," and the interior divided off by heavy brick walls, iron doors, and railings. Thus the expenditure of money is said to have been limited only by the accomplishment of the desired object, and the statement of the material used is in connection with the representation as to the quality of the exterior. No one reading of inside walls and railings of incombustible material, and of an exterior fire-proof, could suppose that a precaution against fire made necessary by statute had been omitted, or that a builder who called attention to such matters as an inducement to patronage could have regarded wooden window-frames as in any sense fire-proof. The language of the circular is very emphatic. In effect, it says the buildings, as a whole, have been erected at an immense cost; from which assertion alone, in view of the business to which they were devoted, one would expect strength and adaptation of materials, and skill in construction, affording security, at least, against all the ordinary dangers to which property might be exposed when put in store. But this general statement is followed by the declaration that no expense has been spared in supplying "protection against the spread of fire;" and this assurance is made prominent by the display of capital letters, and justified by the explanation which relates to an existing state of things, viz., "the exterior being fire-proof," and still further emphasized by the more moderate and qualified statement as to the interior. That is not said to be fire-proof, but only "divided off by heavy brick walls and iron doors and railings;" describing, at the same time, its arrangement, and the substance of its walls and partitions.

As to this, therefore, the statement would be true, although the floors, lintels, stairs, landings, ties, joists, ceilings, and other parts were of wood, but no such discrimination is suggested as to the exterior. The strength of the walls might, indeed, be impaired by the necessary openings for doors and windows, but for the purpose of

preventing mischief by fire, or, as the defendant put it, "the spread of the fire," the exterior is pronounced fire-proof. Had he only said of the exterior, as he did of the interior, "the wall is of brick," the intending customer would have been put to an inquiry as to the window-frames and doors. He said much more. We think, therefore, that the defendant must be regarded as stating a fact, and not as expressing a mere opinion, when he described the exterior, that is, the whole exterior, of his buildings as fire-proof. Such statement is not to be classed with those relating to value, or prospective profits, or prospects of business, or assertions in regard to a speculative matter, concerning any of which men may differ. It relates to something accomplished; to an existing fact, as distinguished from one yet to come into existence. It was made after calling to mind the use to which the buildings were to be put, the fact that the attention of the builder had been especially directed to "protection against the spread of fire," which could be effected only by the use of proper materials; and the statement was made with knowledge that such materials had not been used.

Nor is it like the safe case cited by the respondent,—*Walker v. Milner*, 4 Fost. & F. 745. There the action was upon a warranty that "the safe in question was thief-proof;" "that nothing can break into it." It was broken into. There was no suggestion of fraud or deceit, and the jury were required to discriminate between what was represented and what was warranted, and, unless satisfied there was a warranty, to find for the defendant. The safe-maker's prospectus was put in evidence. It stated that the safes would insure the safety of valuable property contained in them. The court said: "The words cited from the circular could hardly be understood in the sense of a warranty or assurance of perfect safety, but only as importing a representation of a high degree of strength." They were promissory merely. Then plaintiff's counsel referred to a later prospectus, in which the safes in question were only spoken of "as of the strongest security," and relied on this as implying a withdrawal of the previous warranty. But Cockburn, J., observed that, "assuming later prospectuses to have been issued after the burglary, it was only dictated by common honesty; for, after it had been found by actual experience that the safe was not absolutely secure against all possible attempts, it would have been fraudulent to continue previous description." In the case at bar the plaintiff alleges fraud. A jury might find that an exterior of a city building partly of wood, although to no greater extent than the one in question, was not fire-proof, within the meaning and intent of the circular. They might also find that when the circular was issued this fact was known to the defendant; and then the doctrine suggested by Cockburn, J., in the case cited, would have some application.

Nor do the other cases referred to seem to support respondent's contention. They exclude the idea of fraud, and relate to matters of mere opinion; as whether a certain valve will consume smoke and save fuel, (*Prideaux v. Bunnett*, 1 C. B., N. S., 613;) whether certain pictures were the work of the old masters, or copies, (*Jendwine v. Slade*, 2 Esp. 572;) whether land was of the value certified to, (*Gordon v. Butler*, 105 U. S. 553, 26 L. Ed. 1166.) But in none of them is it denied that, if the person making the statement or expressing the opinion had at the time knowledge of its falsity, the action would lie. It is certainly well settled upon principles of natural justice that for every fraud or deceit which results in consequential damage to a party he may have an action.

Here the complaint states, not only a false representation, with a fraudulent intent, but that the falsehood was conscious and willful; that by it the plaintiff was induced to deliver her property to be stored in the building, and thereby incurred loss. The evidence may be so viewed as to sustain these allegations. The learned counsel for the respondent has stated, in the broadest and most unqualified terms, as a proposition not to be disputed, "that no man is liable for the expression of his opinion or judgment." But this is true only when the opinion stands by itself and is intended to be taken as distinct from anything else; and, where the proposition is found in the books, it is so restricted. Thus it is said: "Matters of opinion, stated merely as such, will not, in general, form the ground to a legal charge of fraud." *Leake*, Cont. 355, giving many instances and also exceptions to the rule. Statements of value have been held insufficient to sustain an action where, as is said, they were "mere matters of opinion," (*Simar v. Canaday*, 53 N. Y. 306, 13 Am. Rep. 523;) but at the same time it is shown that under certain circumstances they are to be regarded as affirmations of fact, and then, if false, an action can be maintained upon them. The same rule applies where A, desiring credit of B for a certain amount, the latter asks C as to the solvency of A, and he replies, "He is good; as good as any man in the country for that sum." No doubt this involves opinion; but it is held that if the recommendation was made in bad faith, and with knowledge that A was insolvent, C would be liable. *Upton v. Vail*, 6 Johns. 181, 5 Am. Dec. 210. And so as to every representation concerning a matter of fact, by which one man is induced to change his position, to his injury, or the benefit of another, it may be so expressed as to bind the person making it to its truth, whether it take the form of an opinion or not, or it may appear that it was not intended to be acted upon. In the latter case no obligation is incurred.

In the circular issued by the defendant there are many words of commendation, which, however strong, could not be relied upon as the basis of contract. The ones at first referred to are not of that character. They relate to the present, and describe a portion of the

building in its existing state as "being fire-proof." This is not a matter of opinion, for it defines a state or condition, and, if part of that portion was of wood, may properly be regarded as "a false statement of a fact." Whether the defendant knew the component parts of his own buildings, and, if so, whether the statement was made with intent to deceive, and whether it was an inducement to the contract, the learned counsel for the respondent has fully argued. At present it is unnecessary to discuss those questions, for it seems to us they are, as the case stands, properly for the jury; and upon the only point which appears to have been considered by the court below we are obliged to differ from them.

That the issues may be more fully tried, the judgment should be reversed, and a new trial granted, with costs to abide the event.

All concur, except ANDREWS and MILLER, JJ., not voting, and EARL, J., dissenting.

Judgment reversed.

(See also *Marsh v. Falker*, 40 N. Y. 562; *Southern Development Co. v. Silva*, 125 U. S. 247, 8 Sup. Ct. 881, 31 L. Ed. 678; *Mooney v. Miller*, 102 Mass. 217; *Holbrook v. Connor*, 60 Me. 578, 11 Am. Rep. 212; *Cowley v. Smyth*, 46 N. J. Law, 380, 50 Am. Rep. 432.)

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(171 Mass. 307, 50 N. E. 623.)

LYNCH v. MURPHY (in part).

(Supreme Judicial Court of Massachusetts. Middlesex. May 20, 1898.)

DECEIT—SALE OF STOCK—OPINION AS TO VALUE.

Mere expressions of opinion by a promoter of a corporation as to the value of its stock as an investment, which would naturally be based largely on the success of a certain patent, will not sustain an action of deceit brought by a purchaser of such stock.

Report from Superior Court, Middlesex County; Charles S. Lilley, Judge.

Action by Patrick Lynch against Daniel J. Murphy. Judgment ordered on the verdict for defendant.

KNOWLTON, J. This is an action for deceit. The plaintiff alleges that the defendant fraudulently made certain false representations in connection with the sale to him of stock in a corporation. The corporation was called the Haggerty Water-Motor Company, and was organized, under the laws of the state of Maine, for the purpose of manufacturing and selling water motors under patents. The plaintiff testified on cross-examination that before he bought any stock in the company he had seen the machine in operation at the defendant's house, and that he went to look at it there. He also tes-

tified that when he purchased his stock he knew that the machine was not perfected, and that they were experimenting on it. All his testimony shows that he knew enough about the corporation to understand that the value of its stock must be largely a matter of opinion, and dependent upon future contingencies. All the alleged false representations on which he relies were in regard to the value of the stock as an investment, and related in the main, if not altogether, to the future. Considered in connection with the nature of the property, they were plainly mere expressions of opinion, which, when made by a vendor, will not sustain an action for deceit. *Belcher v. Costello*, 122 Mass. 189; *Nash v. Trust Co.*, 159 Mass. 439, 34 N. E. 625; *Id.*, 163 Mass. 574, 40 N. E. 1039, 28 L. R. A. 753, 47 Am. St. Rep. 489; *Deming v. Darling*, 148 Mass. 504, 20 N. E. 107, 2 L. R. A. 743; *Andrews v. Jackson*, 168 Mass. 266, 47 N. E. 412, 37 L. R. A. 402, 60 Am. St. Rep. 390. The plaintiff bought stock at different times. The first time he bought of the defendant and of Haggerty, who was the patentee of the machine. He testified that the stock book and certificates showed that the stock so purchased was treasury stock of the company. Afterwards he bought of one Wholey, a stockholder, and later of one Brennan, and still later he bought more of the defendant and Haggerty, which also was treasury stock, transferred to him by one Williams as trustee for the company. The report leaves it uncertain whether the stock bought of Wholey and of Brennan was or was not treasury stock. The plaintiff testified that in making each of these purchases he was influenced by the defendant's representations of value, which, as we have already said, purported to be, from their very nature, mere expressions of opinion. There are other branches of the case in which the weight of the evidence is in favor of the defendant; but, without considering them, we are of opinion that a verdict was rightly ordered for him on the ground that the only representations made by him did not purport to be anything more than statements of opinion, upon which a purchaser cannot safely rely.

#### Judgment on the verdict.

(Representations in regard to the *value* of property, in order to effect a sale, are usually, as in the above case, held to be statements of opinion, and therefore not to afford a cause of action to the vendee if he is misled thereby. *Gordon v. Butler*, 105 U. S. 553, 26 L. Ed. 1166; *Shade v. Creviston*, 93 Ind. 591; *Watts v. Cummins*, 59 Pa. 84; *Bossingham v. Syck*, 118 Iowa, 192, 91 N. W. 1047; *Ellis v. Andrews*, 56 N. Y. 83, 15 Am. Rep. 379; *Endsley v. Johns*, 120 Ill. 469, 12 N. E. 247, 60 Am. Rep. 572. But there are important exceptions to, and qualifications of, this doctrine. Thus such representations may sometimes be deemed statements of fact, as, e. g., where statements as to the value of stock were made by one who, as president and manager of the company, possessed a special knowledge of such value. *Shelton v. Healy*, 74 Conn. 265, 50 Atl. 742; *Andrews v. Jackson*, 168 Mass. 266, 47 N. E. 412, 37 L. R. A. 402, 60 Am. St. Rep. 390; *Hedin v. Minneapolis Medical Inst.*, 62 Minn. 146, 64 N. W. 158, 35 L. R. A. 417, 54 Am. St. Rep. 628; *Collins v.*

Jackson, 54 Mich. 186, 19 N. W. 947. So one making false statements of value may be held liable, if he employs some artifice to prevent inquiry or the obtaining of knowledge by the vendee [Chrysler v. Canaday, 90 N. Y. 272, 43 Am. Rep. 166; Leonard v. Springer, 197 Ill. 532, 64 N. E. 299]; or if he makes false statements as to facts affecting the question of value [Messer v. Smyth, 59 N. H. 41; Schumaker v. Mather, 133 N. Y. 590, 30 N. E. 755].

In a few states false statements by a vendor as to the *price* he paid for property are treated as statements of value, and as therefore not affording a cause of action. Richardson v. Noble, 77 Me. 390; Hemmer v. Cooper, 8 Allen, 334; but see Belcher v. Costello, 122 Mass. 189; cf. Hauk v. Brownell, 120 Ill. 161, 11 N. E. 416. Other states, with better reason, hold the contrary. Fairchild v. McMahon, 139 N. Y. 290, 34 N. E. 779, 36 Am. St. Rep. 701; Page v. Parker, 43 N. H. 363, 369, 80 Am. Dec. 172; Dorr v. Cory, 108 Iowa, 725, 78 N. W. 682.

In like manner, false statements as to the *law*, or the legal effect of a document, will not constitute actionable fraud [Burt v. Bowles, 69 Ind. 1; Gormely v. Gymnastic Ass'n, 55 Wis. 350, 13 N. W. 242; Jaggard v. Winslow, 30 Minn. 263, 15 N. W. 242; Upton v. Tribilcock, 91 U. S. 45, 50, 23 L. Ed. 203]; as, e. g., where a man selling and assigning a legacy assured the vendee that the legacy was as good as a mortgage upon any man's farm [Duffany v. Ferguson, 66 N. Y. 482].

It is also a general rule that false representations, to constitute fraud, must relate to past or present facts or occurrences, and hence that false *promises* or false statements of future intentions do not amount to fraud. Burt v. Bowles, 69 Ind. 1; Long v. Woodman, 58 Me. 49; Milwaukee Brick Co. v. Schoknecht, 108 Wis. 457, 84 N. W. 838; Pollard v. McKenney [Neb.] 96 N. W. 679, 681; Taylor v. Commercial Bank, 174 N. Y. 181, 184, 66 N. E. 181, 62 L. R. A. 783, 95 Am. St. Rep. 564. But if false statements of fact accompany the promises, and are relied upon to his injury by the person to whom the statements are made, fraud is committed. Kley v. Healy, 127 N. Y. 555, 28 N. E. 593; Dashiell v. Harshman, 113 Iowa, 283, 85 N. W. 85. So false promises, if made with the intent not to fulfill them, and with the purpose and effect of deceiving another person to his injury, have been adjudged to constitute fraud, and contracts or conveyances rescinded therefor, or equitable relief granted. Goodwin v. Horne, 60 N. H. 485; Pollard v. McKenney [Neb.] 96 N. W. 679; Dowd v. Tucker, 41 Conn. 197; Jones v. Jones, 40 Misc. Rep. 360, 82 N. Y. Supp. 325. On this ground it is generally held that, though a purchase of goods on credit by one who is insolvent, without disclosing his insolvency, is not fraudulent, yet if the purchaser has also at the time of the sale an intent not to pay for the goods, he is guilty of fraud, and the goods may be reclaimed from the vendee. Hotchkin v. Third Nat. Bank, 127 N. Y. 329, 27 N. E. 1050; Wright v. Brown, 67 N. Y. 1; Donaldson v. Farwell, 93 U. S. 631, 23 L. Ed. 993; Stewart v. Emerson, 52 N. H. 301, citing many cases; Burrill v. Stevens, 73 Me. 395, 40 Am. Rep. 366; Slagle v. Goodnow, 45 Minn. 531, 48 N. W. 402.)

#### IV. FALSE STATEMENTS AS TO PATENT OR OBVIOUS DEFECTS.

(68 N. Y. 426.)

LONG v. WARREN (in part).

(Court of Appeals of New York. Feb. 13, 1877.)

##### 1. FRAUD—FALSE REPRESENTATIONS BY VENDOR AS TO OBVIOUS FACTS.

When the real quality of property sold is obvious to ordinary intelligence, and the vendee sees the property before the sale, and the truth or falsity of representations made by the vendor as to its condition may be readily ascertained by the vendee by the exercise of ordinary observation, and they are not made for the purpose of throwing him off his guard and diverting him from making inquiry and examination, the vendee has no ground of action for fraud, though he purchases the property in reliance upon such representations.

##### 2. SAME.

In an action for false representations by defendant, whereby plaintiff was induced to purchase defendant's farm, it appeared that defendant represented to plaintiff that there was no quack grass on the farm save in a small two-acre lot, and that plaintiff, relying thereon, purchased the farm. It also appeared that, before purchasing, the plaintiff walked over portions of the farm with his brother-in-law, that both of them were farmers and knew what quack grass was, that this kind of grass is readily distinguishable by its appearance from other growths, that the portions of the farm over which the two men walked contained quack grass in large quantities, and this could have been easily perceived on passing over them. *Held*, that plaintiff could not recover for the false representations of defendant.

Appeal from Supreme Court, General Term, Fourth Department.

Action by Edward Long against Oscar F. Warren to recover damages alleged to have been sustained by plaintiff by false representations of defendant in the sale of a farm. The case was submitted to a referee, who reported for plaintiff. The judgment entered on such report was reversed by the general term. From the judgment of the general term plaintiff appealed.

FOLGER, J. This is an action at law to recover damages for false representations and deceit in the sale of a farm by the defendant to the plaintiff. The representations alleged to be false were as to the non-existence on the farm of a noxious weed or grass known as "quack grass." It is alleged that the plaintiff asked the defendant if there was any quack; and the defendant referred to a little piece north of the garden and the barn, about one and one-half or one and three-fourths acres, and said that there was quack there, and that he dug it out. The plaintiff then asked him if there was any other quack, and he said, "No," there was none on the farm except one little piece, and that the boys had raked all out. This is the testimony of the plaintiff, and tends to prove a representation that there was but one

piece of quack grass on the farm, in extent not more than one and three-quarters acres. The defendant's testimony is that in passing over the farm the plaintiff and he went to what he called the "quack lot," next the road, above the barn; that as they went into that lot the plaintiff said: "This devilish stuff is all over the farm, ain't it?" The defendant told him: "No, it was not; that I did not know of but two other patches, where I had cultivated land; there might be quack in some of the fields I had not plowed, but I had not discovered any. I told him one was by the sand-bank, and the other in next lot west." There is quite a difference in the version of the statements made on that occasion, as given by the plaintiff or the defendant. There was but one other person present, one Kinney, who was a witness at the trial. He says that "the subject of quack grass was mentioned. Plaintiff asked defendant something about quack grass, and defendant said there was some on corner lot north and east of farm, an acre and a half, and that he had had his boys raking it out and burning it. I had seen stuff burning; said they had been burning it and thought that they had got it out. I have no distinct recollection of anything else."

I can but conclude that, on the difference between the plaintiff and defendant as to what was said by the defendant on the subject of the quack grass, the plaintiff is corroborated to a considerable extent by Kinney, and that the preponderance of the testimony is that the defendant represented that there was but one piece, not in size two acres, and that that had been probably got out. This, then, was the substance of the representation made. The proof is ample to show that it was false. Without recapitulating the testimony, it suffices to say that it establishes that there were many places on which the weed was growing; that the extent of it was twenty-five acres, or near thereto; and that it was in vigorous and luxuriant condition.

With this proof of the extent of land affected by it, and the vigor of the growth of it, and that it was upon tilled as well as meadow and pasture land, and some proof of the defendant's knowledge of the presence of it in lots other than that named by him, it is impossible to conclude that the defendant did not know of the existence of it on the farm in more places and to a greater extent than he described to the plaintiff, and that he is chargeable with a scienter of the falsity of his representation. With the facts proven that the plaintiff made particular inquiry of the defendant as to it; that the extent and growth of it was so much larger than the defendant told the plaintiff; and with the fact, hereafter to be noticed, that it was a drawback from the value of the farm, both for cultivation and for sale,—it is not possible to infer that the defendant did not intend to have the plaintiff believe the statement made to him, or that he did not intend to deceive the plaintiff to his harm, and that the representation made is not shown to be a false and fraudulent one.

It is established by the testimony of the plaintiff that he relied upon the statement, and was induced by it to make the purchase of the farm. Scarcely a witness is sworn who does not testify that the presence of quack grass in the soil of a farm, to the extent and strength of growth shown by the testimony, was a damage to the farm either for tillage or for the market. We have, then, the union of fraud and damage thereby, which are valid to give a cause of action. *Bayly v. Merrel*, Cro. Jac. 386.

There is another question yet to be determined before we can say that the plaintiff may recover. It does not appear that the defendant used any artifice, either of word or act, to dissuade or turn away or hinder the plaintiff from making inspection of the farm for himself, so as to ascertain by his own faculties, and those of his companion, Kinney, whether, in fact, there was more of the quack grass upon the premises than the defendant had stated. It is evident that he had the opportunity in full degree to make a personal examination. He was advised by the defendant's declaration, and by his own view of it, that there was one piece of it on the farm, and thus made aware of the possibility of it being in the whole soil. He had twice passed across the farm in company with Kinney. He had heard and read of this grass; indeed, his inquiry as to it of the defendant shows that he was alive to the evil of it. He had encountered it before in his own garden, and had seen it before on Sturtevant's farm, more than once, as he passed over it. He had been a farmer all his life, and knew what quack grass was. Kinney, who was with him, and is his brother-in-law, had known quack grass for the ten years before the trial; had seen it elsewhere, on other land, at the time they passed over the farm; and had had it on his own farm, his business being that of a farmer, and had got a good deal out by raking and burning. They went into the orchard on their first visit to the farm. They went across the wheat-field then; and on the second visit, they went across the meadow by the barn. The testimony shows that on each of those fields this grass was rooted and growing, on some of them very thrivingly, so that the plaintiff, and his friend who was with him, not only had unrestrained opportunity to go into every field on the farm, and use their faculties in the detection of any noxious plants growing in the soil, but they did, in fact, go into three of the fields in which the testimony shows that it was growing, and where it must have been under their feet. Was there any reason in the nature of things, the season of the year, the structure and appearance of the plant, which would prevent a person looking for it from discovering it? It was in the latter part of the year that they were there, and there had been a frost, but the strength of the testimony is that there was no snow to cover the ground. The testimony is not entirely unanimous as to the ease of distinguishing it from other grasses; but the great preponderance is that it may be quite readily distin-

guished from wheat blades, or from blades of timothy grass, the two plants which it most resembles. It can be told on plowed land, or in growing wheat. It can be seen in a field by one riding along the road. It is plain to be seen; a heavy freeze changes it, but a frost darkens its color, and makes it the more conspicuous. When eaten down close by animals, it is not easily discernible, and some of the pieces where the quack was had been pastured close. But the strength of the testimony is that it is readily perceived by one who is well acquainted with it, among other grasses, or in growing wheat, or on plowed land, and will be noticed by a common observer as he passes through it, or by a man of ordinary prudence, who is about buying a farm.

One is forced by the testimony to the conclusion that had the plaintiff, when he was on the farm before the purchase, taken ordinary pains to look out for this grass, he would have perceived it in some other lots than that to which it was confined in the defendant's representation.

The rule is comprehensively stated as follows by the United States supreme court in *Slaughter's Adm'r v. Gerson*, 13 Wall. 383, 20 L. Ed. 627: "They must be representations relating to a matter as to which the complaining party did not have at hand the means of knowledge. Where means of knowledge are at hand, and equally available to both parties, and the subject of the purchase is equally open to their inspection, if the purchaser does not avail himself of those means and opportunities he will not be heard to say, in impeachment of the contract of sale, that he was drawn into it by the vendor's misrepresentations." See, also, *Davis v. Sims*, *Lalor*, Supp. 234; *Rubber Co. v. Adams*, 23 Pick. 256; *Mooney v. Miller*, 102 Mass. 220. Some of the cases cited were of sales of land.

The testimony in this case, to which we have recurred as above stated, brings the plaintiff within the force of the rules we have above set forth. This quack grass was an object obvious to the intelligence of the plaintiff. He had equal means with the defendant of acquiring information, within the meaning of the rule; for it did not require weeks or days upon the farm, or actual tillage of it, but only the exercise of the faculty of sight while passing over the farm. The truth or falsity of the representations could, by the exercise of ordinary diligence in examination, have been made known. The inquiry and examination was one which a prudent person ought to have made, with the means and opportunity so ready.

The learned counsel for the appellant makes the claim, in his printed points, that the plaintiff and his friend Kinney did exercise all the care and precaution of an ordinarily prudent man. The testimony does not sustain this. There is no proof that they examined or looked with a view to discover the quack if it was there. They testify that they did not discover it; not that they tried to. They did not

go over the farm thoroughly, and with a view to find it there, if it was there growing; nor on the lots which they entered upon was their attention upon this matter and an inspection kept up, which, as we have seen, would have necessarily discovered it. The proof of its existence on the farm, in excess of the defendant's statement, shows it is so luxuriant in growth, so close in its connection stalk to stalk, and so conspicuous to observers having no interest in the question of its presence or absence, as that it is beyond belief that an attempt to find it, made before the purchase, would not have disclosed it. Hence the order of the general term should be affirmed, and judgment absolute given for the defendant.

CHURCH, C. J., and ALLEN and MILLER, JJ., concur. RAPALLO, ANDREWS, and EARL, JJ., dissent.

Order affirmed, and judgment accordingly.

(The ground of this decision is explained in *Schumaker v. Mather*, 133 N. Y. 590, 30 N. E. 755, as follows: "Because the grass was distinguishable enough, and was an object obvious to the plaintiff's intelligence, when he went over the farm and examined it with the view of ascertaining its presence, it was held that no cause of action was made out. The decision was upon the ground that the plaintiff's means of acquiring the information were equal to the defendant's, by 'only the exercise of the faculty of sight while passing over the farm.' \* \* \* I think the general rule is that if the facts represented are not matters peculiarly within the party's knowledge, and the other party has the means available to him of knowing, by the exercise of ordinary intelligence, the truth or the real quality of the subject of the representation, he must make use of those means, or he will not be heard to complain that he was induced to enter into the contract by misrepresentations." In like manner it has been said by the United States Supreme Court: "If, having eyes, the purchaser will not see matters directly before them, where no concealment is made or attempted, he will not be entitled to favorable consideration when he complains that he has suffered from his own voluntary blindness, and been misled by over-confidence in the statements of another." *Slaughter's Adm'r v. Gerson*, 13 Wall. 379, 20 L. Ed. 627.

It is further said in *Albany City Sav. Inst. v. Burdick*, 87 N. Y. 40, 49, that the authority of *Long v. Warren*, ante, p. 657, "should not be extended to cases not clearly within the principles there laid down." In a recent case, for example, where a person, relying upon positive misstatements as to the nature and contents of an instrument, signed it without reading it, since he did not have his spectacles with him, it was held that he was not precluded from attacking the validity of the instrument. "It is certainly not just," says the court, "that one who has perpetrated a fraud should be permitted to say to the party defrauded, when he demands relief, that he ought not to have believed or trusted him." *Wilcox v. American Tel. Co.*, 176 N. Y. 115, 68 N. E. 153. Similar cases are *First Nat. Bank v. Deal*, 55 Mich. 592, 22 N. W. 53; *McGinn v. Tobey*, 62 Mich. 252, 28 N. W. 818, 4 Am. St. Rep. 848; *Mayfield v. Schwartz*, 45 Minn. 150, 47 N. W. 448, 10 L. R. A. 606; *Burroughs v. Pacific Guano Co.*, 81 Ala. 255, 1 South. 212; *Warder, Bushnell & Glessner Co. v. Whitish*, 77 Wis. 430, 46 N. W. 540; see also *Hingston v. L. P. & J. A. Smith Co.*, post, p. 662, and note.

In states where great latitude is allowed to "dealers' talk," as in Maine and Massachusetts, a vendor's statements, known by him to be false, in regard to

the price he paid for the property, or as to offers for it made by others, or as to the quality of goods sold, when the vendee has an opportunity to inspect the goods, and can therefore by reasonable diligence determine the quality for himself, are held to give no cause of action to the vendee, since the means of information are open to him, and since it is naturally to be "understood that such statements are to be distrusted." *Deming v. Darling*, 148 Mass. 504, 20 N. E. 107, 2 L. R. A. 743; *Manning v. Albee*, 11 Allen, 522; *Holbrook v. Connor*, 60 Me. 578, 11 Am. Rep. 212; *Bourn v. Davis*, 76 Me. 223. It is interesting to notice that there is at present a "disinclination to extend this rule" [*Andrews v. Jackson*, 168 Mass. 266, 268, 47 N. E. 412, 37 L. R. A. 402, 60 Am. St. Rep. 390], and that, though it is applied to "seller's talk as to value and quality, in another class of cases the buyer may be warranted in relying wholly on the word of the seller, and hold him liable in damages for fraud." *Lee v. Tarplin*, 183 Mass. 52, 66 N. E. 431.]

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(114 Fed. 294, 52 C. C. A. 206.)

HINGSTON et al. v. L. P. & J. A. SMITH CO.

(Circuit Court of Appeals of the United States, Sixth Circuit. April 8, 1902.)

No. 992.

1. FRAUD—RIGHT TO RELY ON STATEMENT.

Every contracting party, not in actual fault, has a right to rely upon the express statement of an existing fact, the truth of which is known to the contracting party who made it, and unknown to the party to whom it is made, when such statement is the basis of a mutual engagement. He is under no obligation to investigate and verify the statement, to the truth of which the other party to the contract, with full means of knowledge, has deliberately pledged his faith.

2. SAME.

A party making a contract to dredge a harbor, and being at some distance from the harbor at the time, relied, in good faith, on the representations of the other party, who had done a portion of the work and had access to the chart showing soundings, as to the thickness of the rock to be removed, without investigating the facts himself, to ascertain whether the representations were true. The representations were in reality false, and known to be so by the party making them. *Held* that, in this state of the evidence, it was improper to charge the jury that, if both parties had equal opportunities of obtaining information as to the work to be done, the party to whom the representations were made had no right to rely upon them, but that it was his duty to inform himself as to the condition of affairs.

3. SAME—MATTERS OF OPINION.

Representations made after soundings had been taken in the harbor for the purpose of ascertaining the character of the work, and a chart thereof made with which the party making the representations was familiar and the other party not, were not mere expressions of opinion, but were matters of fact, which could be relied on, though not accompanied with specific statements as to actual measurements having been made.

In Error to the Circuit Court of the United States for the Northern District of Ohio.

Before LURTON, DAY, and SEVERENS, Circuit Judges.

DAY, Circuit Judge. This action was brought to recover damages alleged to have been sustained by the plaintiff, the L. P. & J. A. Smith Company, for an alleged breach of contract made with the defendants, Hingston et al., for certain dredging in the harbor of Ashtabula. The defendants alleged that the contract upon which a recovery was sought was obtained by certain fraudulent misrepresentations, among others that the rock which it was necessary to remove under the terms of the contract would average a foot in thickness, which representation was false and untrue, and known to be such when the representation was made, and that the falsity thereof was unknown to the defendants, who made said contract believing said statements to be true and in reliance thereon. Other allegations were made in the answer, unnecessary to notice in the disposition we shall make of this case.

The court charged the jury among other things, as follows: "If you find that Smith, the agent of the plaintiff, and Hingston, one of the defendants, had equal opportunities of obtaining information as to the character, location, and amount of the work to be done, then, as a matter of law, Hingston had no right to rely upon representations made by Smith, but it was his duty to inform himself as to these matters."

To understand the relevancy of this charge, it is necessary to know something of the facts which the testimony tended to develop. The dredging which Hingston & Co. undertook to do for Smith & Co. was in the completion of a contract to remove certain materials from the harbor at Ashtabula, in order to deepen and improve the same for the purposes of navigation. Smith & Co. had already done a considerable portion of the work. The harbor was to be excavated to the depth of 20 feet, the rock and dirt removed where the channel was not of that depth, so as to give 20 feet of clear water. For the purpose of knowing the character of the work to be done, soundings had been taken and a map or chart prepared showing the excavation to be made in carrying out the work. This chart was accessible to the Smiths, and, doubtless, known to them. The character of the work was so far developed that the jury might find it to have been known to the Smith Company's representative when he made the contract with Hingston which has given rise to this suit. The contract was made at Buffalo, a very considerable distance from Ashtabula. Hingston gave testimony tending to show that he did not know the nature and character of the work necessary to be done in carrying out the contract, and relied upon the representation made to him by Smith as to the thickness of the rock excavation to be made. The testimony shows that the thickness of the rock to be removed was a very material circumstance in view of the fact that the work was paid for by the cubic yard, and thick rock could be more profitably handled than thin layers of rock could be. In this

situation of affairs is it sound law to say that Hingston might not rely upon the representations of Smith as to the thickness of the material to be excavated? In a sense it is true that Hingston had equal opportunities with Smith to know the character of the work to be done, and by going to Ashtabula he might have inspected the work and examined the chart. But was he bound to do so? Undoubtedly a party may not shut his eyes to facts which are apparent at the time of making a contract in blind reliance upon the assurance of another that things are not what his senses, if used, would show him they, in fact, are. The rule is well stated in *Slaughter's Adm'r v. Gerson*, 13 Wall. 379-383, 20 L. Ed. 627, cited to sustain the charge of the court below, wherein Mr. Justice Field says: "Where the means of knowledge are at hand and equally available to both parties, and the subject of purchase is alike open to their inspection, if the purchaser does not avail himself of these means and opportunities he will not be heard to say that he has been deceived by the vendor's misrepresentations. If, having eyes, he will not see matters directly before them, where no concealment is made or attempted, he will not be entitled to favorable consideration when he complains that he has suffered from his own voluntary blindness, and been misled by overconfidence in the statements of another."

The important condition that the means of information be at hand is not to be overlooked. The matters directly before the party which may be observed he must be presumed to see. But does the reason or the justice of the rule apply where the subject-matter is not present, but distant from the contracting parties? In such case, where the party making the representation has had means and opportunities to know the facts concerning the subject-matter of the contract which the other party has not had, and cannot have without going to the expense and delay of an investigation of matters at a distance, we see no reason why he may not rely upon such representations of fact. In our opinion, the party making such representations cannot be heard to say, "Their falsity might have been known by an investigation of the facts, and had the other party not been so credulous as to rely upon my representations he would not have been deceived." The rule is thus stated in *Bigelow on Fraud*, 67: "Every contracting party, not in actual fault, has a right, however, to rely upon the express statement of an existing fact, the truth of which is known to the contracting party who made it, and unknown to the party to whom it is made, when such statement is the basis of a mutual engagement. He is under no obligation to investigate and verify the statement, to the truth of which the other party to the contract, with full means of knowledge, has deliberately pledged his faith."

This statement is taken almost verbatim from the opinion in *Mead v. Bunn*, 32 N. Y. 275-280, and is amply sustained by the authorities.

McClellan v. Scott, 24 Wis. 81-87; Hale v. Philbrick, 42 Iowa, 81; Faribault v. Sater, 13 Minn. 228 (Gil. 210); David v. Park, 103 Mass. 501; Savage v. Stevens, 126 Mass. 207; Erickson v. Fisher, 51 Minn. 300, 53 N. W. 638; Henderson v. Henshall, 4 C. C. A. 357, 54 Fed. 320.

In view of the superior knowledge which the testimony tended to show was possessed by Smith as to the nature and character of the work to be done in the execution of the contract entered into, we think it was error to instruct the jury that Hingston had no right to rely upon these material representations, which, if untrue, were misleading and prejudicial.

In this connection the jury were further instructed: "Statements of what condition of things exist beneath the water, made between people whose business it is to deal with things below the water, must be regarded as conjectures, as statements of opinion merely, unless there goes with such statements the assertion of a fact with respect to actual measurements having been made, of which report is sought to be given."

We think this statement, in view of the facts shown, is too broad and liable to mislead. The thickness of the rock to be excavated after the soundings were made was not mere matter of opinion. It was a matter of fact which Smith, there was testimony tending to show, assumed to know and state. Expressions of opinion as to things in their nature not capable of being known, as the prospects of an unopened mine and the like, may not be relied upon, but matters of fact capable of positive knowledge may be the subject of representations for which one may be held liable. In the present case the statement as to the average thickness of the rock to be excavated, under the charge given, could not be relied upon unless statements of actual measurement were made in the same connection which were false. But if the testimony disclosed that the facts as to the thickness of the rock to be excavated might be within the knowledge of Smith resulting from measurements or other means with which he was familiar, and which were unknown to Hingston, such representations may become material, although unaccompanied with specific statements as to measurements. The charge in this respect should be modified in a retrial of the case.

For error in the respects pointed out the judgment will be reversed, and a new trial awarded.

(There is a statement running through the books, and frequently asserted, that "if the means of knowledge, or of acquiring information, are equally open to both parties, the party deceived cannot hold the other liable, since it is his own fault in not ascertaining the truth for himself." This doctrine may well apply in such cases as Long v. Warren, ante, p. 657, where the truth is obvious before a man's face and eyes; but when it is pushed as far as it has been by some decisions, and held to require the exercise of careful and diligent investigation, it is unreasonable. More and more, therefore, the states have

come to the acceptance of the doctrine of the principal case. "One who induces another to walk in the way of a pitfall ought not to be absolved from liability for a resulting injury, even though he might, if permitted to do so, convince the jury that his scheme would not have been successful had the victim displayed ordinary business judgment." *Riley v. Bell*, 120 Iowa, 52, 95 N. W. 170; *Erickson v. Fisher*, 51 Minn. 300, 53 N. W. 638; *Cottrill v. Krum*, 100 Mo. 397, 13 S. W. 753, 18 Am. St. Rep. 549. Hence if a person relies upon a false statement as to the contents of a deed or mortgage, and suffers loss thereby, he has a "remedy against the person deceiving him, though he might have learned the truth by consulting the public records" [*Id.*; *Mead v. Bunn*, 32 N. Y. 275; *Pryse v. McGuire*, 81 Ky. 608; cf. *Nolte v. Reichelm*, 96 Ill. 425]; so as to false statements about a patent, though the buyer might have discovered the fraud by searching the records of the patent office [*McKee v. Eaton*, 26 Kan. 226; *David v. Park*, 103 Mass. 501; *Coulter v. Clark*, 160 Ind. 311, 66 N. E. 739]; so as to the value of bank stock, though the vendee, being a stockholder, might have examined the books of the bank to ascertain the truth [*Union Nat. Bank v. Hunt*, 76 Mo. 439; *Redding v. Wright*, 49 Minn. 322, 51 N. W. 1056]; so as to false statements by the vendor of land as to the number of acres in the parcel sold, though the vendee might have ascertained the truth by a survey or otherwise [*Lovejoy v. Isbell*, 73 Conn. 368, 47 Atl. 682; *Olson v. Orton*, 28 Minn. 36, 8 N. W. 878; *Ledbetter v. Davis*, 121 Ind. 119, 22 N. E. 744]; so as to sales of goods where the falsity of the vendor's statements could have been discovered by investigation [*Perry v. Rogers*, 62 Neb. 898, 87 N. W. 1063; *Strand v. Griffith*, 97 Fed. 854, 38 C. C. A. 444]; and in other like cases. *Burns v. Lane*, 138 Mass. 350; *Dean v. Ross*, 178 Mass. 397, 60 N. E. 119; *Arnold v. Teel*, 182 Mass. 1, 64 N. E. 413; *Linington v. Strong*, 107 Ill. 295; *Hale v. Philbrick*, 42 Iowa, 81; *Clark on Contracts* [1st Ed.] 337. So if false statements be made by a vendor, and he furthermore persuades the vendee not to investigate, the vendor is liable for fraud. *Henderson v. Henshall*, 54 Fed. 320, 4 C. C. A. 357.)

## V. INTENT THAT FALSE STATEMENTS BE ACTED UPON. —TO WHOM THEY MAY BE MADE.

(83 N. Y. 31, 38 Am. Rep. 389.)

EATON, COLE & BURNHAM CO. v. AVERY (in part).

(Court of Appeals of New York. Nov. 30, 1880.)

### DECEIT—LIABILITY TO THIRD PARTIES—INTENT.

Though in general false representations made to one person cannot give a right of action to another to whom they are communicated, and who acts in reliance upon their truth, yet it is not always essential that a representation should be addressed directly to the party who seeks a remedy for having been deceived and defrauded by means thereof; as, for example, where A makes a statement to B for the purpose of being communicated to C, or intending that it shall reach and influence him. On this principle, if a merchant gives to a mercantile agency information which he knows to be false in regard to his circumstances or pecuniary ability, and the agency, in good faith, communicates such information to one of its subscribers, who has an interest in obtaining the knowledge, and the subscriber acts upon the information and thereby suffers loss, the merchant is liable to such subscriber, since it must be presumed that a person intentionally deceiving such an agency intends thereby to deceive those who deal with the agency.

RAPALLO, J. This is an action for deceit, in obtaining the sale and delivery of goods to the firm of Avery & Riggins, by means of false representations made by the defendant as to the pecuniary condition of his firm. The representations charged were not made directly by the defendant to the plaintiff, but are alleged to have been made by him to a mercantile agency (Dun, Barlow & Co.), or its agent, and by it communicated to the plaintiff, who claims that it delivered the goods to Avery & Riggins on credit, on the faith of such representations. The counsel for the defendant contends that the plaintiff cannot maintain an action against the defendant for false representations made by him to Dun, Barlow & Co., or its agent, and that such representations, assuming them to have been made, are not sufficiently connected with the dealing between the defendant and the plaintiff to enable the latter to recover by reason thereof. On this point we are of opinion that the law was correctly stated by the learned judge before whom the trial was had, in his charge to the jury, wherein he instructed them that if the defendant, when he was called upon by the agent of Dun, Barlow & Co., made the statements alleged in the complaint as to the capital of the firm of Avery & Riggins, and they were false, and so known to be by the defendant, and were made with the intent that they should be communicated to and believed by persons interested in ascertaining the pecuniary responsibility of the firm, and with intent to procure credit and defraud such persons thereby, and such statements were communicated to the plaintiff and relied upon by it, and the alleged sale was procured thereby, the plaintiff was entitled to recover. The rule thus laid down accords with the principle of adjudications in analogous cases, in which it has been held that it is not essential that a representation should be addressed directly to the party who seeks a remedy for having been deceived and defrauded by means thereof. *Oazeaux v. Mali*, 25 Barb. 578; *Newbery v. Garland*, 31 Barb. 121; *Bruff v. Mali*, 36 N. Y. 200; *Morgan v. Skiddy*, 62 N. Y. 319; *Commonwealth v. Call*, 21 Pick. 515, 523, 32 Am. Dec. 284; *Commonwealth v. Harley*, 7 Metc. 462. The principle of these cases is peculiarly applicable to the case of statements made to mercantile agencies. Proof was given on the trial as to the business and office of these agencies, but they are so well known, and have been so often the subject of discussion in adjudicated cases, that the courts can take judicial notice of them. Their business is to collect information as to the circumstances, standing and pecuniary ability of merchants and dealers throughout the country, and keep accounts thereof, so that the subscribers to the agency, when applied to by a customer to sell goods to him on credit, may, by resorting to the agency or to the lists which it publishes, ascertain the standing and responsibility of the customer to whom it is proposed to extend credit. A person furnishing information to such an agency in relation to his

own circumstances, means and pecuniary responsibility, can have no other motive in so doing than to enable the agency to communicate such information to persons who may be interested in obtaining it, for their guidance in giving credit to the party; and if a merchant furnishes to such an agency a willfully false statement of his circumstances or pecuniary ability, with intent to obtain a standing and credit to which he knows that he is not justly entitled, and thus to defraud whoever may resort to the agency, and in reliance upon the false information there lodged, extend a credit to him, there is no reason why his liability to any party defrauded by those means should not be the same as if he had made the false representation directly to the party injured.

The counsel for the appellant is undoubtedly right in his general proposition that a false representation made to one person cannot give a right of action to another to whom it may be communicated, and who acts in reliance upon its truth. If A casually or from vanity makes a false or exaggerated statement of his pecuniary means to B, or even if he does so with intent to deceive and defraud B, and B communicates the statement to C, who acts upon it, A cannot be held as for a false representation to C. But if A makes the statement to B for the purpose of being communicated to C, or intending that it shall reach and influence him, he can be so held. In *Commonwealth v. Call*, 21 Pick. 515, 32 Am. Dec. 284, the court say on this point at page 523, that the representation was intended to reach P and operate upon his mind; that it did reach him, and produced the desired effect upon him, and that it was immaterial whether it passed through a direct or circuitous channel.

In *Commonwealth v. Harley*, 7 Metc. 462, the prisoner was indicted for obtaining goods by false pretenses from G. B. & Co. The representations were made by one Cameron, in the absence of the prisoner Harley, to a clerk of G. B. & Co., who communicated them to a member of the firm. But there was evidence that they were made by Cameron with the approbation and direction of Harley, and these facts were held sufficient to sustain a conviction. Neither is it necessary that there should be an intent to defraud any particular person. Should A make a false statement of his affairs to B, and then publicly hold out B as his reference, can it be doubted that he would be bound by the communication of his statement by B to any person who might inquire of him in consequence of this reference? That case differs from the present one only in the fact that here there was no express invitation to the public to call upon Dun, Barlow & Co. for information. But the defendant knew that they were a mercantile agency whose business it was to give information as to the standing and means of dealers, and that it was resorted to by merchants to obtain such information. By making a statement of the financial condition of his firm to such an agency he virtually

instructed it what to say if inquired of. Can it make any difference whether he spontaneously went to the agency to furnish the information or whether he gave it on their application? He must have known that the object of the inquiry was not to satisfy mere curiosity, but to enable the agency to give information upon which persons applying for it might act, in dealing with the defendant's firm.

The case is a new one in its facts, but the principles by which it should be governed are well established.

Judgment affirmed.

(Similar decisions are *Genesee Sav. Bank v. Michigan Barge Co.*, 52 Mich. 164, 17 N. W. 790; *Tindle v. Birkett*, 171 N. Y. 520, 64 N. E. 210, 89 Am. St. Rep. 822. "It is a general rule that a person cannot complain of false representations, for the purpose of maintaining an action of deceit, unless the representations were either made directly to him, with the intention that they should be acted upon by him, or made to another person, with the intention that they should be communicated to him and acted upon by him. A representation made to one person with the intention that it shall reach the ears of another, and be acted upon by him, and which does reach him, and is acted upon by him to his injury, gives the person so acting upon it the same right to relief or redress as if it had been made to him directly." *Henry v. Dennis*, 95 Me. 24, 49 Atl. 58, 85 Am. St. Rep. 365; *S. P. Richardson v. Silvester*, L. R. 9 Q. B. 34; *Watson v. Crandall*, 78 Mo. 583.

On the same principle, it is held that "a director of a corporation who knowingly issues or sanctions the circulation of a prospectus containing false statements of material facts, the natural tendency of which is to deceive and to induce the public to purchase the corporate stock, is liable for the damages sustained by one who, relying upon and induced by the statements, makes such a purchase." *Morgan v. Skiddy*, 62 N. Y. 319; *Terwilliger v. Great Western Tel. Co.*, 59 Ill. 249; cf. *Nash v. Minnesota Title Ins. Co.*, 159 Mass. 437, 34 N. E. 625; *Arthur v. Griswold*, 55 N. Y. 400; *Leonard v. Springer*, 197 Ill. 532, 64 N. E. 299.)

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(154 Mass. 286, 28 N. E. 267, 13 L. R. A. 733.)

HUNNEWELL v. DUXBURY et al.

(Supreme Judicial Court of Massachusetts. Suffolk. September 2, 1891.)

FALSE STATEMENTS BY CORPORATION, IN PUBLIC RECORDS—ACTION BY PERSON RELYING THEREON.

Plaintiff bought notes of a foreign corporation, but before doing so employed an attorney to examine the public records of his own state, which contained, as prescribed by statute, sworn statements by officers and directors of foreign corporations as to the amount of their capital stock and the amount paid in thereon. Defendants, who had sworn to and filed such a statement in regard to the particular corporation whose notes plaintiff thought of purchasing, had made a false statement therein as to the amount of capital stock paid in. Plaintiff bought the notes in reliance upon the truth of this statement, and afterwards sued the defendants to recover damages for the loss he had sustained. *Held*, that defendants were not liable, since the certificate, having only been filed to secure the right to transact business in the state, could not be regarded as communicated by the defendants to the public or to the plaintiff, and was therefore too remote from any design to influence the action of the plaintiff.

Exceptions from Superior Court, Suffolk County; Robert C. Pitman, Judge.

Action by Elias R. Hunnewell against J. W. Duxbury and others for damages for false representations. Judgment for plaintiff, and defendants bring exceptions. Exceptions sustained.

BARKER, J. The action is tort for deceit in inducing the plaintiff to take notes of a corporation by false and fraudulent representations, alleged to have been made to him by the defendants, that the capital stock of the corporation, amounting to \$150,000, had been paid in, and that patents for electrical advertising devices of the value of \$149,650 had been transferred to it. From the exceptions it appears that the corporation was organized in January, 1885, under the laws of Maine, and engaged in business in Massachusetts; that it filed with the commissioner of corporations a certificate dated August 11, 1885, required by St. 1884, c. 330, § 3,<sup>1</sup> signed by the defendants, with a jurat stating that on that date they had severally made oath that the certificate was true to the best of their knowledge and belief; that before the plaintiff took the notes the contents of this certificate had been communicated to him by an attorney whom he had employed to examine the records, and that he relied upon its statements in accepting the notes. There was no other evidence of the making of the alleged representations. The main question is whether the plaintiff can maintain an action of deceit for alleged misstatements contained in the certificate. In the opinion of a majority of the court this question should have been decided adversely to the plaintiff. The execution by the defendants of the certificate to enable the corporation to file it under St. 1884, c. 330, § 3, was too remote from any design to influence the action of the plaintiff to make it the foundation of an action of deceit. To sustain such an action misrepresentations must either have been made to the plaintiff individually, or as one of the public, or as one of a class to whom they are in fact addressed, or have been intended to influence his conduct in the particular of which he complains. This certificate was not communicated by the defendants or the corporation to the public or the plaintiff. It was filed with a state official for the definite purpose of complying with a requirement imposed as a condition precedent to the right of the corporation to act in Massachusetts. Its design was not to procure credit among merchants, but to secure the right to

<sup>1</sup> St. Mass. 1884, c. 330, § 3, provides that every foreign corporation doing business in this commonwealth shall file with the commissioner of corporations a copy of its charter or certificate of incorporation, and a statement of the amount of its capital stock, and the amount paid in thereon to its treasurer; and, if any part of such payment has been made otherwise than in money, the statement shall set forth the particulars thereof; and said statement shall be subscribed and sworn to by its president, treasurer, and by a majority of its directors.

transact business in the state. The terms of the statute carry no implication of such a liability. Statutes requiring similar statements from domestic corporations have been in force here since 1829, and whenever it was intended to impose a liability for false statements contained in them there has been an express provision to that effect; and a requisite of the liability has uniformly been that the person to be held signed knowing the statement to be false. St. 1829, § 90; Rev. St. c. 38, § 28; Gen. St. c. 60, § 30; St. 1870, c. 224, § 38, cl. 5; Pub. St. c. 106, § 60, cl. 5. To hold that St. 1884, c. 330, § 3, imposes upon those officers of a foreign corporation who sign the certificate, which is a condition of its admission, the added liability of an action of deceit, is to read into the statute what it does not contain. If such an action lies, it might have been brought in many instances upon representations made in returns required of domestic corporations, and yet there is no instance of such an action in our reports. In *Fogg v. Pew*, 10 Gray, 409, 71 Am. Dec. 662, it is held that the misrepresentations must have been intended and allowed by those making them to operate on the mind of the party induced, and have been suffered to influence him. In *Bradley v. Poole*, 98 Mass. 169, 93 Am. Dec. 144, the representations proved and relied on were made personally by the defendant to the plaintiff in the course of the negotiation for the shares the price of which the plaintiff sought to recover. *Felker v. Yarn Co.*, 148 Mass. 226, 19 N. E. 220, was an action under Pub. St. c. 106, § 60, to enforce a liability explicitly declared by the statute. Nor is there any English case which goes to the length necessary to sustain the plaintiff's action. The English cases fall under two heads: (1) Those of officers, members, or agents of corporations, who have issued a prospectus or report addressed to and circulated among shareholders or the public for the purpose of inducing them to take shares. (2) Those persons who to obtain the listing of stocks or securities upon the stock exchange in order that they may be more readily sold to the public, have made representations to the officials of the exchange, which in due course have been communicated to buyers. *Bagshaw v. Seymour*, 4 C. B. (N. S.) 873; *Watson v. Earl of Charlemont*, 12 Adol. & E. (N. S.) 856; *Bedford v. Bagshaw*, 4 Hurl. & N. 537; *Clarke v. Dickson*, 6 C. B. (N. S.) 453; *Jarrett v. Kennedy*, 6 C. B. 319; *Campbell v. Fleming*, 1 Adol. & E. 40; *Peek v. Derry*, 37 Ch. Div. 541, and L. R. 14 App. Cas. 337; *Angus v. Clifford*, 2 L. R. Ch. 449. In these cases the representations were clearly addressed to the plaintiffs, among others of the public or of a class, and were plainly intended and calculated to influence their action in the specific matter in which they claimed to have been injured. So, too, in the American cases relied on to support the action. *Morgan v. Skiddy*, 62 N. Y. 319; *Terwilliger v. Telegraph Co.*, 59 Ill. 249; *Paddock v. Fletcher*, 42 Vt. 389. The numerous cases cited in the note to *Pasley v. Freeman*,

2 Smith, Lead. Cas. (9th Amer. Ed.) p. 1320, are of the same character. In the case at bar the certificate was made and filed for the definite purpose, not of influencing the public, but of obtaining from the state a specific right, which did not affect the validity of its contracts, but merely relieved its agents in Massachusetts of a penalty. It was not addressed to or intended for the public, and was known to the plaintiff only from the search of his attorney. It could not have been intended or designed by the defendants that the plaintiff should ascertain its contents, and be induced by them to take the notes. It is not such a representation made by one to another with intent to deceive as will sustain the action. Its statements are in no fair sense addressed to the person who searches for, discovers, and acts upon them, and cannot fairly be inferred or found to have been made with the intent to deceive him. This view of the law disposes of the case, and makes it unnecessary to consider the other questions raised at the trial. Demurrer to the second count sustained. Exceptions sustained.

(See, to the same effect, *Peek v. Gurney*, L. R. 6 H. L. 377.)

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## VI. FALSE STATEMENT MUST BE ACTED UPON AND DAMAGE RESULT.

(32 Minn. 197, 20 N. W. 138.)

**HUMPHREY v. MERRIAM** (in part).

(Supreme Court of Minnesota. June 12, 1884.)

### **FRAUD—FALSE REPRESENTATIONS MUST BE ACTED UPON BY PLAINTIFF.**

In an action founded upon the fraud and deceit of the defendant in making false representations, it is necessary for the plaintiff to prove, not only that they were fraudulently made, but also that he believed and relied upon them. Hence, where plaintiff bought stock in a mining company after false and material representations had been made to him by defendant's agent in regard to the value, condition, and productiveness of the company's mine, and as to the amount of its indebtedness, but the evidence showed that plaintiff did not believe the agent's statements, but that he interviewed other persons in regard to the mine and acted upon the information which he obtained from them, *held*, that plaintiff was not entitled to recover damages for the loss he had sustained through this investment.

Appeal from a judgment of the District Court, Ramsey County.

**MITCHELL, J.** This was an action for damages for deceit in the sale of stock of the Florence Mining Company. The deceit consisted, as alleged by plaintiff, in the false and fraudulent statements of one Carver, defendant's agent, who made the sale, as to the value, condition, and productiveness of the company's mine, and as to the

amount of its indebtedness. Assuming that the alleged representations were made, and that they were untrue, (of which facts there was competent evidence,) and that they were material, (which some of them undoubtedly were,) it was incumbent on plaintiff in such an action also to prove (1) that they were fraudulently made; and (2) that he believed them, and relied on them in making the purchase.

We think the evidence utterly fails to show that plaintiff believed these representations, and relied on them in making the purchase. It is true that in his examination in chief he states generally that he relied on them; but his cross-examination conclusively shows that he did not rely on them as true when he made his purchase. He makes the following among other statements: "I wouldn't let him [Carver] touch the money; wouldn't take his word that he was agent for the man. I considered that what he said was wind. I saw a good many men to see how far Carver's representations were corroborated. I was anxious to see how I could protect myself and take the stock. I didn't intend to take Carver's word that he was Merriam's agent. I wanted to see that I was dealing with a responsible man. These representations of Carver's were as the wind, unless they were certified to by the character of an honest man. I didn't mean that he should get any money, and I meant that Mr. Merriam should get my money, and should have the right to say that these things were true." Again, when asked if he would believe anything Carver said, he answered, "No." When he went to see Merriam he says he made him the speech which had been taught him by his attorneys on a former occasion; "I have bought of you, through your agent, Mr. Carver, some Florence." When asked his object in making this speech, he replied, "To see whether he would say that Carver was or was not his agent." The evidence also shows that, so far from believing the statements of Carver, he interviewed numerous other parties, stockholders and others, to ascertain what they knew about the mine, and what value they placed upon the stock, and that, so far as he made the purchase upon a belief in the existence of facts, he acted upon what information he got from the parties, and not upon what Carver told him.

The evidence clearly shows the plaintiff's position to be just this: He knew that mines were proverbially uncertain, and might prove very profitable or a failure. He found that others had faith in the mine, and therefore he had; but he wished something more certain, and wanted a warranty from a responsible man, so that he could keep his stock and get his dividends from the mine if it turned out well, or get his money back from the defendant if it did not. Whatever may have been plaintiff's belief as to the condition or value, present or prospective, of the mine, that belief was not based upon the statement of Carver. His only reliance upon Carver's statements consisted, not in his belief of their truth, but because he thought, if

false, Merriam would be responsible for them. He made his purchase, not because of any belief in their truthfulness, but because he thought Merriam would be liable as warrantor to make them good if they proved untrue. On such a state of facts, as the court below well remarked, if plaintiff made out anything it was a cause of action on a warranty and not for deceit. On either or both of these grounds the action was properly dismissed.

Judgment affirmed.

(To the same effect are *Ming v. Woolfolk*, 116 U. S. 599, 6 Sup. Ct. 489, 29 L. Ed. 740; *Farrar v. Churchill*, 135 U. S. 609, 10 Sup. Ct. 771, 34 L. Ed. 246; *Bish v. Van Cannon*, 94 Ind. 263; *Brackett v. Griswold*, 112 N. Y. 454, 20 N. E. 376. In *Southern Development Co. v. Silva*, 125 U. S. 247, 8 Sup. Ct. 881, 31 L. Ed. 678, it is said that, to prove fraud, "complainant must show, besides the making of the false representation without belief in its truth, that the representation [a] was made with intent that it should be acted upon; [b] that it was acted upon by complainant to his damage; and [c] that in so acting on it the complainant was ignorant of its falsity, and reasonably believed it to be true."

Refraining from action, in reliance upon false representations, and thereby suffering loss, affords also, for like reasons, a ground of action. *Fottler v. Moseley*, 179 Mass. 295, 60 N. E. 788.

The representations upon which plaintiff acted need not have been the sole inducement to his action; it is enough that they formed one of the inducements. *Harrington v. Douglas*, 181 Mass. 178, 63 N. E. 334; *Morgan v. Skiddy*, 62 N. Y. 319.

It must also be shown that the representations were *material* to the contract or transaction which took place between the parties, and, further, that *injury* or *damage* has resulted to the party who acted upon them. *Marshall v. Hubbard*, 117 U. S. 415, 6 Sup. Ct. 806, 29 L. Ed. 919; *Pasley v. Freeman*, ante, p. 71, and note thereto.)

## CONFLICT OF LAWS IN REGARD TO TORTS.

([1902] App. Cas. 176.)

CARR v. FRACIS TIMES & CO. (In part).

(House of Lords. July 8, 1901.)

### 1. ACTION—LEX LOCI—LEX FORI.

To found an action for a wrong committed abroad the wrong must be such that it would have been actionable if committed in the country where the action is brought, and the act must not have been justifiable by the law of the place where it was committed.

### 2. RIGHT OF ACTION IN ENGLAND FOR ACTS IN FOREIGN TERRITORIAL WATERS.

British goods on board a British ship within the territorial waters of Muscat were seized by an officer of the British navy under the authority of a proclamation issued by the Sultan, the sovereign ruler, of Muscat.

*Held* that, the seizure having been shown to be lawful by the law of Muscat, no action could be maintained in this country by the owner of the goods against the naval officer.

In 1898 the appellant, an officer of the British navy in command of H. M. S. *Lapwing*, acting under the orders of the British government, seized in the territorial waters of Muscat ammunition belonging to the respondents which had been shipped by them in London on board the *Baluchistan*. The respondents having brought an action against the appellant for the conversion of the goods, the defense was that the seizure was lawful by the law of Muscat, having been authorized by a proclamation issued by the Sultan, the sovereign ruler, of Muscat, and pronounced to be lawful by a court of inquiry in Muscat, whose decision was confirmed by the Sultan. Evidence of this was given at the trial. Grantham, J., who tried the case with a jury, entered judgment for the defendant. The Court of Appeal (A. L. SMITH, VAUGHAN WILLIAMS, and ROMER, L. JJ.) reversed this decision, and entered judgment for the plaintiff for the value of the ammunition.

LORD MACNAGHTEN. The respondents, who are, or were, merchants carrying on business in London, Bushire, and Muscat, sue the appellant, a captain in the British navy, for an alleged wrong committed abroad. He seized their goods, as they allege, illegally, and they claim compensation in damages.

Now, it is well settled by a series of authorities (of which the latest is the case of *Phillips v. Eyre*, L. R. 6 Q. B. 1, in the Exchequer Chamber), that in order to found an action in this country for a wrong committed abroad two conditions must be fulfilled. In the first place, the wrong must be of such a character that it would have been actionable if committed in England; and, secondly, the act must not have been justifiable by the law of the place where it was committed. In the present case the whole question turns upon the second proposition. It is not disputed that the alleged wrong would have been actionable if it had been committed in England or on the high seas. It was, however, committed within the dominions of the Sultan of Muscat, who is duly proved to be an independent sovereign. It was committed in the territorial waters of Muscat, which are, in my opinion, for this purpose, as much a part of the Sultan's dominions as the land over which he exercises absolute and unquestioned sway.

The appellant says that the act complained of was done under the authority and by the direction of the Sultan; that he adopted it as his act, and declared it to be legal. In support of this assertion the appellant relies upon two documents—the proclamation of January 13, 1898, and the report of April 15, 1898, adopted and confirmed by

the Sultan himself. The real question is, what is the true meaning and effect of these documents?

The respondents contend that the documents in question come to nothing more than this: That the Sultan of Muscat announced by formal proclamation that so far as he was concerned her Britannic Majesty was welcome to seize munitions of war destined for Indian or Persian ports, if they were the property of British subjects, when found within the territorial waters of Muscat; that he would not resent such an act as an invasion of his sovereignty; and that afterwards, on inquiry, he declared that he was satisfied that her Britannic Majesty had done no more than he had permitted her to do. I do not think that this was the meaning of these documents. I think the meaning was that the act, if done, was to be done under his authority, as his act, and that after inquiry he adopted the act as his own, and declared it to be legal—legal, that is, according to the law of Muscat, which, for anything I know to the contrary, may be nothing more than the will and pleasure of the despot who rules over that country. If this was the true meaning of these documents—if the act was legal in Muscat, and therefore justifiable there—in my opinion there is a conclusive answer to the action, and I am therefore of opinion that the appeal must be allowed.

Order of Court of Appeal reversed.

(To the same effect is *Machado v. Fontes* [1897] 2 Q. B. 231, holding that an action would lie in England for a libel published in Brazil.)

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(117 Mass. 109, 19 Am. Rep. 400.)

#### LE FOREST v. TOLMAN.

(Supreme Judicial Court of Massachusetts. Middlesex. Jan. 27, 1875.)

#### ACTION—LEX LOCI—LEX FORI—PERSONAL INJURIES IN OTHER STATE.

Where a dog, owned and kept in one state, strayed into another state, and there bit a person, and there was no proof of scienter, it was *held* that no action lay against the owner or keeper in the state of his residence for such injury, since an action therefor could not have been maintained in the state where the injury occurred.

Tort, under Gen. St. c. 88, § 59, to recover double the amount of the damage sustained from the bite of a dog.

At the trial in the superior court, before Aldrich, J., it appeared that the plaintiff was bitten and injured by the defendant's dog at Pelham, in the state of New Hampshire, where the plaintiff lived with his father and mother; that the defendant was a resident of Dracut, in this commonwealth, and had a place of business in Lowell, and kept his dog at Dracut and at his place of business in Lowell; that the day the injuries complained of were done the defendant's dog strayed away from his owner into New Hampshire, and was seen

several times in the neighborhood of the plaintiff's residence; that the next day the plaintiff's father received the dog and carried him to the defendant at his place of business in Lowell. Upon this state of facts, the defendant asked the judge to rule that the action could not be maintained, which the judge declined to do. The jury returned a verdict for the plaintiff, and the defendant alleged exceptions.

GRAY, C. J. In order to maintain an action of tort, founded upon an injury to person or property, and not upon a breach of contract, the act which is the cause of the injury and the foundation of the action must at least be actionable or punishable by the law of the place in which it is done, if not also by the law of the place in which redress is sought. *Smith v. Condry*, 1 How. 28, 17 Pet. 20, 11 L. Ed. 35; *The China*, 7 Wall. 53, 64, 19 L. Ed. 67; *Blad's Case*, 3 Swanst. 603; *Blad v. Bamfield*, Id. 604; *General Steam Navigation Co. v. Guillou*, 11 M. & W. 877; *Phillips v. Eyre*, L. R. 4 Q. B. 225, 239, and L. R. 6 Q. B. 1; *The Halley*, L. R. 2 Adm. 3, and L. R. 2 P. C. 193; *Stout v. Wood*, 1 Blackf. 71; *Wall v. Hoskins*, 27 N. C. 177; *Mahler v. Norwich & N. Y. Transp. Co.*, 35 N. Y. 352; *Needham v. Grand Trunk Ry.*, 38 Vt. 294; *Richardson v. New York Cent. R. Co.*, 98 Mass. 85.

In the case at bar the injury sued for was done to the plaintiff in New Hampshire by a dog owned and kept by the defendant in Massachusetts. Such an action could not be maintained at common law, without proof that the defendant knew that his dog was accustomed to attack and bite mankind. *Popplewell v. Pierce*, 10 Cush. 509; *Pressey v. Wirth*, 3 Allen, 191. No evidence of such knowledge, or of the law of New Hampshire, was introduced at the trial. Nor is it contended that the defendant would be liable to any action or indictment by the laws of that state.

The plaintiff relies upon the statute of this commonwealth, which provides that "every owner or keeper of a dog shall forfeit to any person injured by it double the amount of the damage sustained by him, to be recovered in an action of tort." Gen. St. c. 88, § 59. This statute is not a penal, but a remedial, statute, giving all the damages to the person injured. *Mitchell v. Clapp*, 12 Cush. 278. It does not declare the owning or keeping of a dog to be unlawful, but that if the dog injures another person the owner or keeper shall be liable, without regard to the question whether he had or had not a license to keep the dog. The wrong done to the person injured consists, not in the act of the master in owning or keeping, or neglecting to restrain, the dog, but in the act of the dog, for which the master is responsible.

The defendant having done no wrongful act in this commonwealth, and the injury for which the plaintiff seeks to recover damages hav-

ing taken place in New Hampshire, and not being the subject of action or indictment by the laws of that state, this action cannot be maintained.

### Exceptions sustained.

(A later Massachusetts case holds that "if, by the law of another state where a personal injury is suffered, a recovery may be had there, an action may be maintained for the injury here, although the plaintiff could not have recovered therefor if the injury had happened here"; thus establishing a broader rule than is established in England. *Walsh v. New York & N. E. R. Co.*, 160 Mass. 571, 36 N. E. 584, 39 Am. St. Rep. 514; followed in *Bence v. New York, N. H. & H. R. Co.*, 181 Mass. 221, 63 N. E. 417; see also *Herrick v. Minneapolis & St. L. R. Co.*, 31 Minn. 11, 16 N. W. 413, 47 Am. Rep. 771. The difference in the authorities on this subject is pointed out in *Huntington v. Attrill*, 146 U. S. 657, 670, 13 Sup. Ct. 224, 228, 36 L. Ed. 1123, as follows: "In order to maintain an action for an injury to the person or to movable property, some courts have held that the wrong must be one which would be actionable by the law of the place where the redress is sought, as well as by the law of the place where the wrong was done. See, for example, *The Halley*, L. R. 2 P. C. 193, 204; *Phillips v. Eyre*, L. R. 6 Q. B. 1, 28, 29; *The M. Moxham*, 1 P. D. 107, 111; *Wooden v. Western N. Y. & P. R. Co.*, 126 N. Y. 10, 26 N. E. 1050, 13 L. R. A. 458, 22 Am. St. Rep. 803; *Ash v. Baltimore & O. R. Co.*, 72 Md. 144, 19 Atl. 643, 20 Am. St. Rep. 461. But such is not the law of this court. By our law, a private action may be maintained in one state, if not contrary to its own policy, for such a wrong done in another and actionable there, although a like wrong would not be actionable in the state where the suit is brought. *Smith v. Condry*, 1 How. 28, 11 L. Ed. 35; *The China*, 7 Wall. 53, 54, 19 L. Ed. 67; *The Scotland*, 105 U. S. 24, 29, 26 L. Ed. 1001; *Dennick v. Central R. Co.*, 103 U. S. 11, 26 L. Ed. 439; *Texas & P. R. Co. v. Cox*, 145 U. S. 593, 12 Sup. Ct. 905, 36 L. Ed. 829." In accord with this latter doctrine are *Northern Pac. R. Co. v. Babcock*, 154 U. S. 190, 14 Sup. Ct. 978, 38 L. Ed. 958; *Higgins v. Central N. E. & W. R. Co.*, 155 Mass. 176, 180, 29 N. E. 534, 31 Am. St. Rep. 544; *Evey v. Mexican Cent. R. Co.*, 81 Fed. 294, 26 C. C. A. 407, 38 L. R. A. 387; cf. *Johnson v. Chicago & N. W. R. Co.*, 91 Iowa, 248, 59 N. W. 66.

In New York it is held to be discretionary with the courts whether they shall entertain jurisdiction of actions between non-residents for personal injuries, when the injury was committed outside of the state. *Burdick v. Freeman*, 120 N. Y. 420, 24 N. E. 949; *Collard v. Beach*, 81 App. Div. 582, 81 N. Y. Supp. 619.

Where an action was brought in Ohio for an injury caused in Pennsylvania, and the law of the latter state gave no cause of action in such a case, it was held that the action in Ohio was not maintainable, even though the laws of Ohio would have given full relief had the transaction occurred within that state. *Alexander v. Pennsylvania Co.*, 48 Ohio St. 623, 30 N. E. 69. In other words, the *lex loci delicti*, not the *lex fori*, determines as to whether there is a cause of action. *Alabama G. S. R. Co. v. Carroll*, 97 Ala. 126, 11 South. 803, 18 L. R. A. 433, 38 Am. St. Rep. 163.)

(158 U. S. 105, 15 Sup. Ct. 771, 39 L. Ed. 913.)

ELLENWOOD v. MARIETTA CHAIR CO. (in part).

(Supreme Court of the United States. May 6, 1895.)

No. 234.

**ACTION FOR TRESPASS ON LAND A LOCAL ACTION.**

An action for trespass upon land, like an action to recover the title or the possession of the land itself, is a local action, and can only be brought within the state in which the land lies.

In Error to the Circuit Court of the United States for the Southern District of Ohio.

The case is stated in the opinion.

Mr. Justice GRAY. This action was brought in the circuit court of the United States for the Southern District of Ohio by one Walton, administrator of the estate of Latimer Bailey, deceased, and a citizen of New Jersey, against the Marietta Chair Company, a corporation of Ohio.

By the law of England, and of those states of the Union whose jurisprudence is based upon the common law, an action for trespass upon land, like an action to recover the title or the possession of the land itself, is a local action, and can only be brought within the state in which the land lies. *Livingston v. Jefferson*, 1 Brock. 203, Fed. Cas. No. 8,411; *McKenna v. Fisk*, 1 How. 241, 247, 11 L. Ed. 117; *Northern I. R. Co. v. Michigan Cent. R. Co.*, 15 How. 233, 242, 251, 14 L. Ed. 674; *Huntington v. Attrill*, 146 U. S. 657, 669, 670, 13 Sup. Ct. 224, 36 L. Ed. 1123; *British South Africa Co. v. Companhia De Moçambique* [1893] App. Cas. 602; *Cragin v. Lovell*, 88 N. Y. 258; *Allin v. Lumber Co.*, 150 Mass. 560, 23 N. E. 581, 6 L. R. A. 416; *Thayer v. Brooks*, 17 Ohio, 489, 492, 49 Am. Dec. 474; *Kinkead*, Code Pl. § 35.

The original petition contained two counts, the one for trespass upon land, and the other for taking away and converting to the defendant's use personal property; and the cause of action stated in the second count might have been considered as transitory, although the first was not. *McKenna v. Fisk*, above cited; *Williams v. Breedon*, 1 Bos. & P. 329.

But the petition, as amended by the plaintiff on motion of the defendant, and by order and leave of the court, contained a single count, alleging a continuing trespass upon the land by the defendant, through its agents, and its cutting and conversion of timber growing thereon. This allegation was of a single cause of action, in which the trespass upon the land was the principal thing, and the conversion of the timber was incidental only, and could not, therefore, be maintained by proof of the conversion of personal property without also

proving the trespass upon real estate. *Cotton v. U. S.*, 11 How. 229, 13 L. Ed. 675; *Eames v. Prentice*, 8 Cush. 337; *Howe v. Willson*, 1 Denio, 181; *Dodge v. Colby*, 108 N. Y. 445, 15 N. E. 703; *Merriman v. Harvesting Mach. Co.*, 86 Wis. 142, 56 N. W. 743. The entire cause of action was local. The land alleged to have been trespassed upon being in West Virginia, the action could not be maintained in Ohio. The circuit court of the United States, sitting in Ohio, had no jurisdiction of the cause of action, and for this reason, if for no other, rightly ordered the case to be stricken from its docket, although no question of jurisdiction had been made by demurrer or plea. *British South Africa Co. v. Companhia De Moçambique* [1893] App. Cas. 602, 621; *Weidner v. Rankin*, 26 Ohio St. 522; *Youngstown v. Moore*, 30 Ohio St. 133; *Rev. St. Ohio*, § 5064.

Judgment affirmed.

(Nearly all the authorities support this doctrine as to actions for trespass on realty. *Barrett v. Palmer*, 135 N. Y. 336, 31 N. E. 1017, 17 L. R. A. 720, 31 Am. St. Rep. 835; *American Union Tel. Co. v. Middleton*, 80 N. Y. 408; *Niles v. Howe*, 57 Vt. 388; *Du Breuil v. Pennsylvania Co.*, 130 Ind. 137, 29 N. E. 909; *Eachus v. Trustees of Illinois & M. Canal*, 17 Ill. 534. But in Minnesota it has been held to be a transitory action. *Little v. Chicago, St. P., M. & O. R. Co.*, 65 Minn. 48, 67 N. W. 846, 33 L. R. A. 423, 60 Am. St. Rep. 421.)

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(88 Va. 971, 14 S. E. 838, 15 L. R. A. 583.)

**NELSON'S ADM'R v. CHESAPEAKE & O. RY. CO. (In part).**

(Supreme Court of Appeals of Virginia. March 31, 1892.)

**ACTION FOR WRONGFUL DEATH—CONFLICT OF LAWS—JURISDICTION OF DOMESTIC COURT.**

An action to recover damages for a death caused by the wrongful act of another, though statutory only, may be maintained in another state than that in which the injury was committed, if it be not inconsistent with the laws or public policy of the state in which the suit is brought, or prejudicial to its interests. Thus where plaintiff's intestate was killed, through defendant's negligence, in West Virginia, where a statute was in force allowing a recovery of damages by action in such cases, it was held proper to institute the action in the state of Virginia, where defendant was found, the right to recover in such case to be governed by the statute of West Virginia; such statute not being inconsistent with the laws or policy of the state of Virginia.

Error to Circuit Court of City of Richmond; B. R. Wellford, Judge.

Action by the administrator of Andrew Nelson, deceased, against the Chesapeake & Ohio Railway Company to recover damages for the negligent killing of plaintiff's intestate. Deceased was a laborer on the line of defendant's road, in West Virginia, and while being transferred from the point where he was employed to another point

on the line in the same state, and while riding on top of one of defendant's cars, pursuant to the direction of the defendant's agents, was brushed off the car by a timber on the bridge, which had been negligently allowed to remain attached to the bridge a few feet above the top of the car. Deceased at the time of his death was a citizen and resident of Virginia, and plaintiff qualified as his administrator in the county in which deceased resided. To a judgment of the circuit court, sustaining a demurrer, plaintiff sued out a writ of error. Reversed.

LEWIS, P. If the statute of West Virginia giving the right to sue in a case like this were a penal statute, it is clear that the present action could not be maintained, for the courts of one state do not execute the penal laws of another, such laws being strictly local. Story, *Conf. Laws*, § 621; *The Antelope*, 10 Wheat. 66, 6 L. Ed. 268. But the statute is not penal, but compensatory, in its nature; its object being to give a remedy for certain injuries, not as a punishment to the defendant, primarily for the benefit of those who are supposed to have been pecuniarily injured by the death of the deceased. It is contended, however, that the statute, whatever may be its nature, can have no extraterritorial operation, and, therefore, that an action dependent upon it can be maintained only in the state of West Virginia. At common law, all personal actions, whether *ex delicto* or *ex contractu*, are transitory, and may be brought anywhere the defendant can be found. Thus, for instance, an assault and battery committed, or a contract made, in one state, may be the subject of an action in another; if process can be served on the defendant in the latter state. 3 Bl. Comm. 294; *Mostyn v. Fabrigas*, Cowp. 161; *Livingston v. Jefferson*, 1 Brock. 203, Fed. Cas. No. 8,411; *Payne v. Britton*, 6 Rand. (Va.) 101; *Watts v. Thomas*, 2 Bibb, 458; *McKenna v. Fisk*, 1 How. 241, 11 L. Ed. 117; 2 Smith, Lead. Cas. (9th Ed.) 967. Independently of statute, however, the general rule is that all torts die with the person. Consequently the right to sue for personal injuries causing death is purely statutory. The question, therefore, arises, whether such a cause of action arising in one state may be asserted in another. There is no doubt that, in a general sense, a statute can have no operation beyond the state in which it is enacted. But where a right to sue is given by statute in one state, we can see no good reason why an action to enforce that right should not be entertained in the courts of another state, on the ground of comity, just as if it were a common-law right, provided, of course, it be not inconsistent with the laws or policy of the latter state. If this were not so, a cause of action arising in a state whose laws are codified could not be asserted in another state, because the right to sue is statutory. The true test, therefore, in all such cases would seem to be this: Is the foreign statute contrary to the known pol-

icy, or prejudicial to the interest, of the state in which the suit is brought? And if it is not, then it makes no difference whether the right asserted be given by the common law or by statute. There are undoubtedly cases which hold a contrary doctrine. *Woodard v. Railroad Co.*, 10 Ohio St. 121; *Richardson v. Railroad Co.*, 98 Mass. 85; *McCarthy v. Railroad Co.*, 18 Kan. 46, 26 Am. Rep. 742; *Ash v. Railroad Co.*, 72 Md. 144, 19 Atl. 643, 20 Am. St. Rep. 461. The case of *Vawter v. Railway Co.*, 84 Mo. 679, 54 Am. Rep. 105, has also been referred to for the defendant; but that case went off on the ground, principally, that the action was prohibited by the laws of Missouri. On the other hand, by far the greater number of the more recent decisions, and in fact the almost entire current of authority, support the view we have expressed. In *Dennick v. Railroad Co.*, 103 U. S. 11, 26 L. Ed. 439, an action was brought in a state court of New York, and afterwards removed to a federal court, to recover damages for injuries causing the death of the plaintiff's intestate in New Jersey. The action was brought under a statute of the latter state, and the question was whether it could be maintained in New York. The supreme court held that it could, although it was conceded that the right to sue depended solely upon the New Jersey statute. In the course of the opinion, delivered by Mr. Justice Miller, it was said: "It is difficult to understand how the nature of the remedy, or the jurisdiction of the court to enforce it, is in any manner dependent on the question whether it is a statutory right or a common-law right. Whenever, either by the common law or the statute law of a state, a right of action has become fixed, and a legal liability incurred, that liability may be enforced and the right of action pursued in any court which has jurisdiction of such matters, and can obtain jurisdiction of the parties." And, referring to the Ohio, Massachusetts, and Kansas cases, (*supra*), it was said: "The reasons which support that view we have endeavored to show are not sound." A similar question had shortly before been decided in the same way by the court of appeals of New York, in *Leonard v. Navigation Co.*, 84 N. Y. 48, 38 Am. Rep. 491. In that case it was held that an action is maintainable in New York by the personal representatives of one whose death is caused by injuries received in another state, whose statute is similar to that of New York on the same subject. It is not essential, it was said, that the two statutes should be precisely the same. The plaintiff, however, as was decided in a subsequent case, must both aver and prove that the action is authorized by the laws of the state in which the wrong was committed. *Debevoise v. Railroad Co.*, 98 N. Y. 377, 50 Am. Rep. 683. Like decisions have been rendered in Tennessee, Mississippi, Iowa, Nebraska, Indiana, Minnesota, Kentucky, Pennsylvania, and perhaps in other states. See *Railroad v. Sprayberry*, 8 Baxt. 341, 35 Am. Rep. 705; *Railroad Co. v. Doyle*, 60 Miss. 977; *Railroad Co. v. Crudup*, 63

Miss. 291; *Morris v. Railway Co.*, 65 Iowa, 727, 23 N. W. 143, 54 Am. Rep. 39; *Railroad Co. v. Lewis*, 24 Neb. 848, 40 N. W. 401, 2 L. R. A. 67; *Burns v. Railroad Co.*, 113 Ind. 169, 15 N. W. 230; *Herrick v. Railroad Co.*, 31 Minn. 11, 16 N. W. 413, 47 Am. Rep. 771; *Bruce v. Railroad Co.*, 83 Ky. 174, (overruling *Taylor v. Pennsylvania Co.*, 78 Ky. 348, 39 Am. Rep. 244); *Knight v. Railroad Co.*, 108 Pa. 250, 56 Am. Rep. 200. In the last-mentioned case the court concludes a discussion of the subject by remarking that the great weight of authority favors the application of the same rule to all transitory actions for injuries, whether recognized by the common law or by statute, unless contrary to the policy of the state in which the action is brought. "The claim of comity on which the rule is founded," it was said, "is as urgent in one case as the other." This case was considered by the court in *Usher v. Railroad Co.*, 126 Pa. 206, 17 Atl. 597, 4 L. R. A. 261, 12 Am. St. Rep. 863, as having settled the doctrine in Pennsylvania, although it was held in the latter case that the action could not be maintained by the widow of the deceased, who was killed in New Jersey, because the statute of New Jersey required the suit to be brought in the name of the personal representative. If a different doctrine were established,—that is to say, if an action could be brought only in the state in which the wrong is committed,—then the wrong-doer, by removing and absenting himself from the state, could not be personally sued at all. We do not think this was the intent of the statute we are asked to enforce. Why, then, should it not be enforced? It is true it is not precisely similar to our own statute, yet it is not essentially dissimilar. Indeed, in several important particulars the two statutes are exactly alike. Thus, both require the action to be brought by the personal representative; both limit the recovery to \$10,000; and under both, in a case the facts of which are like those of the present case, the recovery inures to the benefit of the same person, namely, the father of the deceased.

Judgment reversed.

(In regard to actions of this kind, under statutes, for injuries causing death, there is a like difference of opinion among the authorities to that quoted above on page 678, from *Huntington v. Attrill*, 146 U. S. 657, 670, 13 Sup. Ct. 224, 36 L. Ed. 1123. In New York and some other states the action is not maintainable unless the state wherein the action is brought has a statute on the subject similar to that of the state where the injury took place; in New York, however, it is said that the statutes need not be precisely alike, but it is enough if they are of similar import and character, founded upon the same principle, and possessing the same general attributes. *Wooden v. Western N. Y. & P. R. Co.*, 126 N. Y. 10, 26 N. E. 1050, 13 L. R. A. 458, 22 Am. St. Rep. 803; *Harrill v. South Carolina R. Co.*, 132 N. C. 655, 44 S. E. 109; *Cincinnati, H. & D. R. Co. v. McMullen*, 117 Ind. 439, 20 N. E. 287, 10 Am. St. Rep. 67; *O'Reilly v. New York & N. E. R. Co.*, 16 R. I. 388, 17 Atl. 171, 906, 19 Atl. 244, 5 L. R. A. 364, 6 L. R. A. 719; *Knight v. West Jersey R. Co.*, 108 Pa. 250, 56 Am. Rep. 200. On the other hand, the federal

courts hold that an action for such a tort can be maintained "where the statute of the state in which the cause of action arose is not in substance inconsistent with the statutes or public policy of the state in which the right of action is sought to be enforced." *Stewart v. Balt. & O. R. Co.*, 168 U. S. 445, 18 Sup. Ct. 105, 42 L. Ed. 537; *Burrell v. Fleming*, 109 Fed. 489, 47 C. C. A. 598. To the same effect are *Herrick v. Minneapolis & St. L. R. Co.*, 31 Minn. 11, 16 N. W. 413, 47 Am. Rep. 771, and *Higgins v. Central N. E. & W. R. Co.*, 155 Mass. 176, 29 N. E. 534, 31 Am. St. Rep. 544; cf. *Morris v. Chicago, R. I. & P. R. Co.*, 65 Iowa, 727, 23 N. W. 143, 54 Am. Rep. 39. The principle is well stated in this last case as follows: "In cases of other than penal actions, the foreign law, if not contrary to our public policy, or to abstract justice or public morals, or calculated to injure the state or its citizens, [will] be recognized and enforced here, if we have jurisdiction of all necessary parties, and if we can see that, consistently with our own forms of procedure and law of trials, we can do substantial justice between the parties." It is to be hoped that this liberal and salutary doctrine will be the one that will finally prevail.

The right of action in these cases stands upon the statute of the state where the injury occurred, and not upon that of the state where the redress is sought. *Hamilton v. Hannibal & St. J. R. Co.*, 39 Kan. 56, 18 Pac. 57; *Burns v. Grand Rapids & I. R. Co.*, 113 Ind. 169, 15 N. E. 230; *Debevoise v. New York, L. E. & W. R. Co.*, 98 N. Y. 377, 50 Am. Rep. 683. Hence if there is no cause of action by the *lex loci delicti*, there is none by the *lex fori*. *Id.*; *Kahl v. Memphis & C. R. Co.*, 95 Ala. 337, 10 South. 661. So the *lex loci delicti* controls, in general, as to who may sue. *Boulden v. Pennsylvania R. Co.*, 205 Pa. 264, 54 Atl. 906; *Fabel v. Cleveland, C. & St. L. R. Co.*, 30 Ind. App. 268, 65 N. E. 929; *Wooden v. Western N. Y. & P. R. Co.*, 126 N. Y. 10, 26 N. E. 1050, 13 L. R. A. 458, 22 Am. St. Rep. 803; *Thorpe v. Union Pac. Coal Co.*, 24 Utah, 475, 68 Pac. 145; *Oates v. Union Pac. Ry. Co.*, 104 Mo. 514, 16 S. W. 487, 24 Am. St. Rep. 348; cf. *Dennick v. Railroad Co.*, 103 U. S. 11, 26 L. Ed. 439.)

[END OF CASES ON TORTS.]

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ure of justice, or to enforce settled principles of law.—*Lamb v. Stone*, 17; *Rice v. Coolidge*, 28.

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Lies against one inducing sale of goods to another by false representations, though he has no interest in such sale, and has not colluded with any person who has. The gist of the action is the injury to plaintiff, and not whether defendant meant to be a gainer.—*Pasley v. Freeman*, 73.

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May be maintained for loss of a marriage by plaintiff in consequence of words spoken of plaintiff by defendant, although such words are not in themselves actionable, and although plaintiff has a remedy for breach of the contract of marriage.—*Moody v. Baker*, 109.

May be maintained against one who entices away a servant while under contract of employment with plaintiff for a certain term under a specified penalty, notwithstanding plaintiff has a remedy on such contract against the servant.—*Moody v. Baker*, 111.

Wherever a man does an act which, in law and in fact, is a wrongful act, and such an act as may, as a natural and probable consequence of it, produce injury to another, and which, in the particular case, does produce such an injury, an action on the case will lie. If these conditions are satisfied, the action does not the less lie because the natural and probable consequence of the act complained of is an act done by a third person; or because such act so done by the third person is a breach of duty or contract by him, or an act illegal on his part, or an act otherwise imposing an actionable liability on him.—*Bowen v. Hall*, 115.

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Action of trespass *vi et armis* lies if the damage complained of is the immediate effect of the act of the defendant; if consequential only, and not immediate, case is the proper remedy.—*Brown v. Kendall*, 129.

Where performance of right or duty created by law is assumed by contract, action for breach may be either *ex contractu* or *ex delicto*.—*Baltimore City Pass. Ry. Co. v. Kemp*, 138, note 11.

An action *ex contractu*, by the owner against some of the wrongdoers, is an election to treat the transaction as a sale, and bars a subsequent action against the other wrongdoers for conversion.—*Terry v. Munger*, 140.

The owner of goods wrongfully taken may waive the tort and sue on implied contract.—*Terry v. Munger*, 140.

In cases of contract, where there is no legal duty independent of the contract, one not in privity with a party to the contract cannot recover against him in tort for an injury involving a breach of the contract.—*Winterbottom v. Wright*, 155.

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Failure of plaintiff to have writ returned, or to appear at the court to which it is returnable, a final determination of the action.—*Cardinal v. Smith*, 275.

May be maintained for malicious prosecution of a civil proceeding; at least if there has been deprivation of liberty, or taking of property.—*Cardinal v. Smith*, 275.

May be maintained for an arrest which is a malicious abuse of process.—*Grainger v. Hill*, 289.

May be maintained for a combination or conspiracy, by fraudulent and malicious acts, to drive a trader out of business, resulting in damages.—*Van Horn v. Van Horn*, 295.

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third person is shown, giving a distinct cause of action for the malice which caused the breach of contract resulting in damages to him.—*Van Horn v. Van Horn*, 295.

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May be brought for overflowage caused by alteration of dam, without previous notice to abate.—*Curtice v. Thompson*, 459.

Cannot be maintained for a nuisance causing injury to plaintiff, unless he shows some special damage to his person or property differing in kind from that sustained by other persons subjected to inconvenience and injury from the same cause.—*Wesson v. Washburn Iron Co.*, 464.

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Cannot be maintained by contractor for support of town paupers against a person inflicting personal injury upon such a pauper, on the ground that thereby the contractor was subjected to extra expenditure.—*Mobile Life Ins. Co. v. Brame*, 625.

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## ACTION ON THE CASE.

Does not lie for disturbance of a ferry right under the statute regulating ferries.—*Almy v. Harris*, 35.

Where an act is in law and fact wrongful, and is such as may, as a natural and probable consequence of it, produce injury to another, and which in the particular case does produce such an injury, an action on the case will lie.—*Bowen v. Hall*, 115.

## ACT OF GOD.

Damage to cargo by water escaping through pipe of steam boiler in consequence of pipe having been cracked by frost is due to negligence of captain and not act of God.—*Siordet v. Hall*, 83.

## ADJOINING LANDOWNERS.

Not liable for obstruction of access of light or air to adjacent land, unless adverse right thereto has been acquired.—*Guest v. Reynolds*, 4.

Owner of land may improve it in his own way, if he violates no duty to any adjacent owner, or to the public.—*Gramlich v. Wurst*, 12.

One making excavations in land is liable for injury caused thereby to land of adjoining tract in its natural condition, even though there was no negligence in making such excavations.—*Gilmore v. Driscoll*, 45.

One making excavations in land is not liable, in the absence of negligence, for injury to improvements on adjoining tract, unless adjoining owner has acquired a right to support thereof by grant or prescription.—*Gilmore v. Driscoll*, 48.

A landowner has the absolute right to have his land remain in its natural condition unaffected by any act of his neighbor.—*Gilmore v. Driscoll*, 49.

That land in which one makes excavations does not belong to him does not affect his liability for injury to adjoining lot.—*Gilmore v. Driscoll*, 49.

Where lateral support of soil is removed, owner is entitled to recover for loss of and injury to soil, not for cost of restoring it or difference in market price.—*Gilmore v. Driscoll*, 50.

Railroad company, doing blasting on its own land and exercising due care, is not liable for injury to adjoining property arising from incidental jarring.—*Booth v. Rome, W. & O. T. R. Co.*, 56.

Not liable for opening wells on his own land and drawing water therefrom, although supply of water to wells on another's land is diminished thereby.—*Ocean Grove Camp Meeting Ass'n v. Commissioners of Asbury Park*, 59.

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For appropriation of soil of a public highway trespass lies by the owner of land through which highway passes.—*Gidney v. Earl*, 390.

One of two adjoining proprietors upon whose land cattle stray from the highway, from which they pass, through a defect in that portion of the division fence which he was by law bound to keep in repair, upon the land of the other, is not liable to the latter in trespass therefor, although he would be liable for such trespass by cattle rightfully on his land.—*Lawrence v. Combs*, 415.

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## ADVERSE POSSESSION.

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## ADVERSE RIGHTS.

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## AGENCY.

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## AGREEMENT.

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## ANCIENT LIGHTS.

English doctrine not applicable in Illinois.—*Guest v. Reynolds*, 4; *Miller v. Woodhead*, 7.

## ANIMALS.

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Owner of domestic animals liable for injuries committed by them while trespassing on the close of another, irrespective of his knowledge of their vicious propensities; but not liable for injuries by them unless they were trespassing, or he had knowledge of their vicious propensities.—*Van Leuven v. Lyke*, 395.

The owner of an ox which, while being driven along the highway, escapes and enters premises of another adjoining the highway, is not liable for the damages thereby done, unless there was negligence on his part.—*Tillett v. Ward*, 413.

One of two adjoining proprietors upon whose land cattle stray from the highway, from which they pass, through a defect in that portion of the division fence which he was by law bound to keep in repair, upon the land of the other, is not liable to the latter in trespass therefor; although he would be liable for such trespass by cattle rightfully on his land.—*Lawrence v. Combs*, 415.

One keeping a mischievous or vicious animal, with knowledge of its propensities, is bound to keep it secure at his peril; he cannot excuse himself

from liability for injuries inflicted by it by proof of due care.—*Muller v. McKesson*, 484.

The negligence of a servant in loosing his master's ferocious dog is no defense to an action for the injury caused by the dog to a fellow servant, as the gravamen of the action is the keeping of a ferocious animal with knowledge of its nature, and not the negligent care of it.—*Muller v. McKesson*, 485.

A person in the employ of another, charged with specific duties, does not while in the performance of such duties, assume the risk of injury from a vicious animal kept by the employer, which he is informed will be kept fastened.—*Muller v. McKesson*, 488.

Owner of cattle is bound to prevent them from escaping from his land and doing mischief; but, with regard to tame beasts having no exceptionally vicious disposition so far as known, the owner is not liable for the hurt they may inflict upon the persons of others.—*Marshall v. Welwood*, 562.

The negligence of the owner of an animal in leaving it fettered in the highway does not preclude his maintaining an action for the killing of the animal occasioned by the negligent act of the driver of a wagon in running into it, if the driver's negligence was the proximate cause of the injury, and if he might have avoided it by exercise of ordinary care.—*Davies v. Maun*, 571.

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## APPORTIONMENT.

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## ARREST.

Written complaint on oath that certain goods were stolen and that complainant "has probable cause to suspect and does suspect" that a certain person stole them, without further proof, does not give a justice jurisdiction to issue a warrant for the arrest of the person charged, so as to protect him from liability for false imprisonment.—*Blodgett v. Race*, 227.

A judicial officer having general powers is responsible for causing an arrest in all cases over which he has cognizance, unless the case is, by complaint or other proceeding, put colorably under his jurisdiction.—*Grove v. Van Duyen*, 233.

Where an attorney for judgment creditors issued a void execution for arrest of the judgment debtor, the judgment creditors were liable.—*Guilleaume v. Rowe*, 238.

Complaint held insufficient to justify warrant of arrest, so as to protect officer.—*Elsemore v. Longfellow*, 240.

An officer making an arrest under process issued by a magistrate is liable for false imprisonment, if the process is void on its face.—*Elsemore v. Longfellow*, 240.

Under a constitutional provision that no warrant to seize any person shall issue without special designation of the person to be seized, a warrant describing the accused as "a person whose name is not known, but whose per-

son is well known, of V., of the county of K.," is insufficient to protect an officer making an arrest thereunder.—*Harwood v. Siphers*, 247.

By private person without warrant excused only where felony has in fact been committed and there was reasonable ground to suspect the person arrested.—*Burns v. Erben*, 250.

By officer without warrant justified, though no felony has been actually committed, if he has reasonable ground to suspect that it has and acts in good faith.—*Burns v. Erben*, 250.

In action for false imprisonment, facts *held* not to justify arrest without warrant.—*White v. McQueen*, 254.

For breach of the peace, while it continues justifiable without warrant.—*Quinn v. Heisel*, 257; *Phillips v. Trull*, 259.

By officer, without a warrant, for a past offense, not a felony, is not justified by information or suspicion.—*Quinn v. Heisel*, 257.

By officer, without warrant, is not justified by a threat or other indication of a breach of the peace, unless the facts warrant a belief that the arrest is necessary to prevent the commission of the offense, without reference to any past similar offense of which the person may have been guilty before the officer's arrival.—*Quinn v. Heisel*, 257.

An arrest made under lawful process, though wrongfully obtained, is not a ground of action for false imprisonment.—*Hobbs v. Ray*, 264.

Action maintainable for arrest which is a malicious abuse of process.—*Grainger v. Hill*, 289.

Arrest may be made without actually touching the person.—*Grainger v. Hill*, 291.

Warrant regular on its face, sufficient authority to a constable to make the arrest commanded therein, although he has knowledge of facts which render the warrant void for want of jurisdiction.—*People v. Warren*, 547.

## ASSAULT AND BATTERY.

Action maintainable for assault and battery by explosion of lighted squib first thrown by defendant, although plaintiff would not have been injured without intervention of others.—*Clark v. Chambers*, 102; *Vandenburgh v. Truax*, 85.

Action not maintainable for injury from a blow which was the result of pure accident, or was involuntary and unavoidable.—*Brown v. Kendall*, 130.

A party advising or aiding in committing an assault is liable, though not personally present at the time of its commission.—*Bell v. Miller*, 181.

Pointing an unloaded gun at one who supposes it to be loaded, although within the distance it would carry if loaded, is not, without more, an assault punishable criminally, although it may sustain a civil action for damages.—*Chapman v. State*, 185.

Riding after a person, so as to compel him to run to shelter to avoid being beaten, is, in law, an assault.—*Martin v. Shoppee*, 187.

Advancing in a threatening attitude and with intent to strike another, so that the blow would almost immediately reach him, is, in law, an assault by the person advancing with such intent, although he is stopped before he is near enough to the other to strike him.—*Stephens v. Myers*, 188.

To constitute a criminal assault there must be a present purpose to do injury.—*State v. Crow*, 190.

Words accompanying menacing acts and indicating that there is no intent to do actual violence may be considered on the question whether such acts constitute an assault.—*State v. Crow*, 190.

To touch another in anger, though in the slightest degree, or under pretense of passing, is, in law, a battery.—*Cole v. Turner*, 191.

Aiming and firing a loaded pistol in the direction of another constitutes a criminal assault.—*Engelhardt v. State*, 192.

Raising a stick, within striking distance of another, as if to strike him, although that is prevented by the other wrenching the stick from the assailant, constitutes a criminal assault.—*Engelhardt v. State*, 192.

Laying hold of another's person in a rude and hostile manner is a battery.—*Engelhardt v. State*, 192.

Where two combatants fight together willingly, neither in self-defense, each is guilty of an assault and battery on the other.—*Engelhardt v. State*, 193.

No defense to action for assault and battery that the acts complained of were committed in a fight engaged in by mutual consent, although such consent may be shown in mitigation of damages.—*Barbolt v. Wright*, 194.

Assault in defense of property justifiable, unless unreasonable force is used.—*Scribner v. Beach*, 197; *Commonwealth v. Donahue*, 202; *Newkirk v. Sabler*, 393.

Words alone do not justify an assault.—*Daniel v. Giles*, 204.

In action of damages for assault, evidence that three hours before the alleged assault plaintiff insulted defendant's wife is inadmissible, as not being provocation at time of assault.—*Dupee v. Lentine*, 206.

Assault by servant of carrier in expelling passenger for wanton violation of reasonable regulation justifiable, unless more force is used than necessary for the purpose, or a dangerous or inconvenient place is selected for such expulsion.—*Illinois Cent. R. Co. v. Whittemore*, 208.

Corporal punishment of pupil by teacher to enforce compliance with proper rules for good conduct and order of school justifiable, if inflicted with sound discretion and judgment, and adapted to the offender as well as the offense.—*Sheehan v. Sturges*, 211.

Assault by officer in overcoming unlawful resistance to service of process justifiable, unless excess of force is used by him.—*Hager v. Danforth*, 214.

A private person, who uses force in abating a public nuisance, causing special injury, is liable for assault.—*State v. White*, 479.

## ATTACHMENT.

Fraudulent purchase of debtor's goods to prevent attachment not ground of action by creditor for damages for fraud.—*Lamb v. Stone*, 17.

Purchaser from attachment debtor, of goods attached in his hands, entitled to equitable set-off for advances made to or debts paid for principal debtor in good faith.—*Lamb v. Stone*, 18.

An action for maliciously suing out an excessive attachment may be brought before the termination of the attachment suit, where the validity of the debt on which the attachment issued is not in dispute.—*Zinn v. Rice*, 288.

## ATTORNEYS.

Where an attorney for judgment creditors issued a void execution for arrest of the judgment debtor, the judgment creditors were liable.—Guilleaume v. Rowe, 238.

An attorney causing issue of void or irregular process is liable for loss or injury thereby occasioned to parties against whom it is enforced.—Fischer v. Langbein, 242.

One who, in instituting an alleged malicious prosecution, submitted all the facts of the case which he knew were capable of proof fairly to his counsel, and acted bona fide on the advice given, is not liable to an action therefor, even though the facts did not warrant the advice and the prosecution.—Walter v. Sample, 273.

Court of general criminal jurisdiction has power to strike from the roll of attorneys practicing in the court the name of an attorney guilty of misconduct which is ground for such an order.—Bradley v. Fisher, 532.

Misconduct by an attorney in threatening a judge presiding at a trial, as he was descending from the bench, with personal chastisement for his alleged conduct during the trial, is ground for striking the name of such attorney from the roll of attorneys practicing in the court.—Bradley v. Fisher, 534.

Where a court has power to make an order striking the name of an attorney from the roll of attorneys practicing in the court, error in not citing the attorney, before making such an order, to show cause why it should not be made, however it may affect the validity of the act, does not make it any less a judicial act, nor does it render the judge making the order liable in damages to the attorney, as though the court had proceeded without jurisdiction.—Bradley v. Fisher, 534.

## BAILMENT.

See "Landlord and Tenant"; "Loans"; "Warehousemen."

One who hires a horse to drive to a particular place, and drives beyond the place or in another direction, is liable for a conversion.—Freeman v. Boland, 508.

## BALLOON.

Action maintainable for injuries to property from the descent thereon of a balloon in which defendant had ascended, including damage done by third persons coming to defendant's assistance.—Guille v. Swan, 119.

## BATTERY.

See "Assault and Battery."

## BELLS.

Ringling the bell of a church, built upon a public street in a thickly settled part of a town, in such manner as to materially affect the health or comfort of all in the vicinity, whether residing or passing there, constitutes a public nuisance.—Rogers v. Elliott, 446.

But one who, by reason of a sunstroke, is peculiarly susceptible to the noise caused by the ringing of a church bell, situated directly opposite his house in a thickly populated district, cannot, in the absence of evidence of express malice, or that the bell was objectionable to persons of ordinary health and strength, maintain an action against the custodian of such church for sufferings caused by the ringing of such bell.—*Rogers v. Elliott*, 445.

Use of bells by employers for purpose of giving notice to their workmen, although such as to cause injury to individuals which a court of equity would restrain, may be authorized by Legislature, subject to regulation by municipal authorities.—*Sawyer v. Davis*, 469.

## BILLS AND NOTES.

See "Negotiable Instruments."

## BLASTING.

Railroad company, doing blasting on its own land and exercising due care, is not liable for injury to adjoining property arising from incidental jarring.—*Booth v. Rome, W. & O. T. R. Co.*, 56.

Blasting rocks with gunpowder so that the fragments are liable to injure adjoining dwelling houses, or persons living or traveling there, constitutes a nuisance.—*Heeg v. Licht*, 451.

## BREACH OF THE PEACE.

Self-defense an excuse.—*Scribner v. Beach*, 197.

Arrest for breach of the peace, while it continues, justifiable without warrant.—*Phillips v. Trull*, 259.

A public nuisance, causing special injury, will not justify a breach of the peace in the abatement thereof by a private person.—*State v. White*, 479.

## BRICK KILNS.

Burning brick in a kiln, which produces noxious gases, injuring another's property, is a nuisance, though brickburning is a useful and necessary industry.—*Campbell v. Seaman*, 419.

Where the injury to shrubbery on plaintiff's premises is caused by the burning of anthracite coal in a brick kiln on adjoining premises by defendant, a prescriptive right to continue the nuisance must be based upon 20 years' actual use of such coal, and not 20 years' use of the kiln.—*Campbell v. Seaman*, 424.

## BRIDGES.

Where a child fell through a bridge into a canal, in consequence of the negligent condition of the bridge, and without contributory negligence of the parents of the child, and the father, in an effort to rescue the child, plunged

into the canal, and both were drowned, the death of both is attributable to negligence in maintaining the bridge.—*Gibney v. State*, 93.

## BROKERS.

Broker having right to sell and deliver property not liable for conversion in selling at a price less than that fixed by his instructions.—*Lavery v. Snethen*, 498.

## CARRIERS.

Common carrier of passengers owes to a passenger a duty to be careful, irrespective of contract.—*Baltimore City Pass. Ry. Co. v. Kemp*, 136.

Statute forbidding railroad companies to expel passengers from trains for nonpayment of fare, at any place other than a regular station, does not apply to a refusal by a passenger to surrender his ticket, as required by a rule of the company.—*Illinois Cent. R. Co. v. Whittemore*, 207.

Railroad company may expel passenger from train for wanton refusal to comply with rule requiring surrender of tickets on the train, using no more force than necessary for the purpose, and not selecting a dangerous or inconvenient place.—*Illinois Cent. R. Co. v. Whittemore*, 208; *Lynch v. Metropolitan El. Ry. Co.*, 224.

Rule requiring railway passengers to surrender their tickets on the trains, a reasonable regulation.—*Illinois Cent. R. Co. v. Whittemore*, 208; *Lynch v. Metropolitan El. Ry. Co.*, 223.

Regulation by a railroad company that a passenger, who fails, before leaving its trains or premises, to produce a ticket or pay his fare, shall be detained until he does so, is illegal.—*Lynch v. Metropolitan El. Ry. Co.*, 223.

Carrier has a lien for fare on baggage of passenger, but not on his person.—*Lynch v. Metropolitan El. Ry. Co.*, 224.

A carrier is not liable in conversion for mere nonfeasance, but may be liable for negligence.—*Wamsley v. Atlas S. S. Co.*, 500.

Where goods intrusted to a common carrier for transportation are delivered by him through mistake or under a forged order to a wrong person, such misdelivery constitutes a conversion.—*Wamsley v. Atlas S. S. Co.*, 501.

Where property is intrusted to a common carrier for transportation, the loss thereof through theft or negligence is not a conversion.—*Wamsley v. Atlas S. S. Co.*, 502.

Refusal to deliver goods to owner, after attachment as property of another, did not constitute a conversion, where the company disclaimed dominion over them.—*Hett v. Boston & M. R. R.*, 521.

Where a station agent had doubts as to whether a charge for detention of the car containing plaintiff's goods was lawful, and as to whether the railroad company would insist on payment, his refusal to deliver the goods before obtaining instructions did not constitute a conversion.—*Hett v. Boston & M. R. R.*, 522.

One hiring a public hack, but exercising no control over the driver, is not responsible for the driver's negligence, so as to prevent him from recovering from a railroad company for injuries from a collision of the train with the hack, due to the negligence of both the managers of the train and the driver.—*Little v. Hackett*, 589.

## CELLAR DOORS.

Action maintainable for personal injuries caused by fall of flap of cellar door, left raised and unfastened by negligence on part of defendant, although its fall was caused by intervening act of third person.—*Clark v. Chambers*, 104.

## CERTIORARI.

Writ lies, at common law, only to officers exercising judicial powers, and to remove proceedings of a judicial character.—*Weaver v. Devendorf*, 537.

## CHILD.

See "Infancy."

## CIPHER.

That a libelous statement by a mercantile agency to its subscribers was in cipher, understood by the subscribers only, is not a defense to an action for libel.—*Sunderlin v. Bradstreet*, 368.

## CIVIL LAW.

Rule as to right of drainage of surface waters, as between owners of adjacent lands, of different elevations, governed by the law of nature; but is not adopted in all the states.—*Barkley v. Wilcox*, 431.

## COLLOQUIUM.

To show that words were meant to impute larceny, extrinsic circumstances must be shown by colloquium.—*Stitzell v. Reynolds*, 380.

## COMMON LAW.

Doctrine as to easements of light and air not adopted in Illinois.—*Guest v. Reynolds*, 4; *Miller v. Woodhead*, 7.

Legal rights may be established by common law, in cases of novel impression.—*Rice v. Coolidge*, 28.

Action lies at common law, where statute gives affirmative remedy, without negative for matter actionable at common law.—*Almy v. Harris*, 35.

Rule that words imputing unchastity to a woman are not actionable unless special damage be shown has been changed by statute in many of the United States.—*Roberts v. Roberts*, 64, note.

## CONCEALMENT.

On a sale of an article for a particular purpose, the suppression by the vendor of a latent defect which makes the article unfit for such purpose is a deceit.—*Grigsby v. Stapleton*, 646.

One who sells cattle, which he knows have a contagious disease, not easily detected except by those acquainted with it, for a sound price, to a purchaser having no knowledge of the fact, if he does not disclose the fact to the purchaser, is guilty of fraudulent concealment of a latent defect, which will defeat an action for the price; under such circumstances, the rule caveat emptor does not apply.—*Grigsby v. Stapleton*, 647.

## CONDITIONS.

Leading horse behind wagon is condition and not cause of injury to horse by being bitten by dog.—*Boulester v. Parsons*, 81.

## CONFIDENTIAL COMMUNICATIONS.

Defamatory words are not privileged because uttered in strictest confidence by one friend to another; nor because they are uttered after the most urgent solicitation; nor because the interview in which they are uttered is obtained at the instance of the person slandered.—*Byam v. Collins*, 365.

That a libelous statement by a mercantile agency to its subscribers was in cipher, understood by the subscribers only, is not a defense to an action for libel.—*Sunderlin v. Bradstreet*, 368.

## CONFLICT OF LAWS.

To authorize an action for a wrong committed abroad, the wrong must be such as would have been actionable in the country where the action is brought, and not justifiable by the law of the place where committed.—*Carr v. Francis Times & Co.*, 675.

An action for damages for wrongful death, though statutory, is transitory, and an action therefor may be maintained in a state other than that in which the injury occurred, where the statute of the state in which the injury occurred is not inconsistent with the laws or policy of the state where such action is brought.—*Nelson's Adm'r v. Chesapeake & O. Ry. Co.*, 681.

An action for trespass on land can be brought only within the state in which the land lies.—*Ellenwood v. Marietta Chair Co.*, 679.

Where a dog owned in one state strays into another, and there injures a person, no action lies against the owner in the state of his residence, where such action would not lie in the state where the injury was committed.—*Le Forest v. Tolman*, 677.

Where British goods, on board a British ship within the territorial waters of a foreign government, were seized by an officer of the British navy under authority of such foreign government, the seizure was lawful, and no action could be maintained therefor in England.—*Carr v. Francis Times & Co.*, 676.

## CONSENT.

Not a justification for an assault, but merely ground of mitigation of damages.—*Barholt v. Wright*, 194.

## CONSORTIUM.

Loss of consortium vicinorum not such special damage as will sustain action for slander in speaking words not actionable in themselves.—*Roberts v. Roberts*, 63.

An action may be maintained by a husband for the loss of consortium with his wife which is implied from criminal conversation of the defendant with her, whether defendant's act was with or against her will, and although it may have caused no actual loss of her services to her husband.—*Bigaouette v. Paulet*, 550.

## CONSPIRACY.

Action maintainable for a combination or conspiracy, by fraudulent and malicious acts, to drive a trader out of business, resulting in damages.—*Van Horn v. Van Horn*, 295.

The gravamen in such an action is not the conspiracy, but the malice; the conspiracy is matter of aggravation or inducement only, in the pleading and evidence, under which one or all of the defendants may be found guilty.—*Van Horn v. Van Horn*, 295.

A combination to injure a man in his trade by inducing his customers or servants to break their contracts with him, if it results in damage, is actionable.—*Quinn v. Leathem*, 297.

## CONSTABLES.

See "Officers."

## CONSTITUTIONAL LAW.

An act of the Legislature, which directs or allows that to be done which would otherwise be a nuisance, is valid, unless it can fairly be said to be an unwholesome and unreasonable law.—*Sawyer v. Davis*, 473.

An injunction restraining the ringing of a factory bell, used to notify employes, before a certain hour in the morning, does not give a vested right which the Legislature is powerless to take away by a statute legalizing the ringing of such bell before that hour, and on a bill of review in such case the injunction will be dissolved.—*Sawyer v. Davis*, 473.

## CONTAGIOUS DISEASES.

Words imputing are actionable.—*Golderman v. Stearns*, 313.

The sale of animals which the seller knows, but the purchaser does not, have a contagious disease, is to be regarded as a fraud, if the disease is latent, and is not disclosed by the vendor.—*Grigsby v. Stapleton*, 646.

## CONTEMPT.

Error of law in adjudging a party guilty of contempt and ordering him to be committed therefor, he having disobeyed an order of the court, and the only question being whether his disobedience defeated, impaired, impeded, or

prejudiced any right or remedy of the defendants, does not affect the jurisdiction of the court, nor render the commitment void; and such party cannot maintain an action for false imprisonment for his arrest and imprisonment under the commitment.—*Fischer v. Langbein*, 242.

Misconduct by an attorney in threatening a judge presiding at a trial, as he was descending from the bench, with personal chastisement for his alleged conduct during the trial, is ground for striking the name of such attorney from the roll of attorneys practicing in the court.—*Bradley v. Fisher*, 534.

## CONTRACTS.

Duty of care on the part of a common carrier of passengers towards a passenger exists irrespective of contract, and its violation is a tort.—*Baltimore City Pass. Ry. Co. v. Kemp*, 136.

The owner of goods wrongfully taken may waive the tort and sue on an implied contract of sale.—*Terry v. Munger*, 140.

Omission to perform a contract obligation, if also an omission of a legal duty, may constitute a tort, even where such legal duty arises from circumstances not elements of the contract, but merely connected with it and dependent upon it.—*Rich v. New York Cent. & H. R. R. Co.*, 149.

In cases of contract, where there is no legal duty independent of the contract, one not in privity with a party to the contract cannot recover against him in tort for an injury involving a breach of the contract.—*Winterbottom v. Wright*, 155.

But where, in cases of contract, the law imposes a duty towards third persons who are not parties to the contract, such persons may recover in an action of tort.—*Thomas v. Winchester*, 157.

Dealer in medicines selling, as a harmless remedy, a poison of similar appearance, liable for injuries caused thereby to a patient to whom it was administered, although there was no privity between them.—*Thomas v. Winchester*, 160.

To render an infant who has hired a horse liable for trespass, he must do some positive act which amounts to an election to disaffirm the contract.—*Moore v. Eastman*, 166.

It seems that one who procures another to break a contract by the latter with a third party is responsible for the breach only where malice to such third person is shown, giving a distinct cause of action for the malice which caused the breach of contract resulting in damages to him.—*Van Horn v. Van Horn*, 295.

A combination without justification to injure a man in his trade by inducing customers or servants to break their contracts with him, if it results in damage, is actionable.—*Quinn v. Leathem*, 297.

Action not maintainable by one party to a contract against a third person for persuading the other party to the contract not to perform it.—*Mobile Life Ins. Co. v. Brame*, 625.

A party, contracting to dredge a harbor and being some distance therefrom at the time, is entitled to rely on the representations of the other party as to the thickness of the rock to be removed, and if such representations are false, and known to the party making them to be so, and are relied upon, he is not bound by the contract.—*Hingston v. L. P. & J. A. Smith Co.*, 664.

Every contracting party not in actual fault has a right to rely on the express statement of an existing fact, the truth of which is known to the contracting party who made it, and unknown to the party to whom it is made, when such statement is the basis of a material engagement.—*Hingston v. L. P. & J. L. Smith Co.*, 664.

## CONTRIBUTION.

The rule that there can be no contribution among wrongdoers applies only to cases where there has been an intentional violation of the law, or where the wrongdoer is to be presumed to have known that the act was unlawful.—*Bailey v. Bussing*, 174.

Where a judgment was recovered in tort against three defendants jointly interested in the running of a stage for an injury caused to a traveler by the negligence of one of the defendants who was driving, one of the other defendants, who was compelled to pay the whole amount of the judgment, was entitled to contribution.—*Bailey v. Bussing*, 172.

## CONTRIBUTORY NEGLIGENCE.

Owner of tenement house who has failed to provide fire escapes therefor as required by statute is not relieved from liability for damage thereby caused to a tenant, by the fact that the tenant had occupied the premises for a few days previous to the fire causing the damage.—*Willy v. Mulledy*, 31.

Leading horse tied behind wagon is not negligence, contributing to injury by vicious dog.—*Boulester v. Parsons*, 81.

Doctrine does not apply to cases of commission of intentional wrong.—*Barholt v. Wright*, 194.

Where a person's own negligence or want of ordinary care and caution so far contributes to an injury to himself that but for such negligence or want of ordinary care and caution on his own part the injury would not have happened, he cannot recover therefor.—*Baltimore & P. R. Co. v. Jones*, 568.

Negligence of a plaintiff precludes him from recovering in an action for defendant's negligence, where he could, by ordinary care, have avoided the consequences of defendant's negligence.—*Davies v. Mann*, 571.

A child of such tender years as to be incapable of exercising judgment and discretion cannot be charged with contributory negligence.—*Twist v. Winona & St. P. R. Co.*, 574.

But even a child is bound to use such reasonable care as one of his age and mental capacity is capable of using; and his failure to do so is negligence.—*Twist v. Winona & St. P. R. Co.*, 575.

An infant three or four years of age is incapable of contributory negligence.—*Mangan v. Brooklyn R. Co.*, 581.

Where a passenger jumped from a moving car to escape a threatened collision, and was injured, it was competent on the question of contributory negligence to show the action of the other passengers.—*Twomley v. Central Park, N. & E. R. R. Co.*, 598.

An engineer, using a defective engine after being assured that it would be repaired, is not guilty of contributory negligence.—*Hough v. Texas & P. Ry. Co.*, 616.

## CONVERSION OF PERSONAL PROPERTY.

Purchasers of stolen goods, on reselling them, are guilty of conversion, though no demand was made for the goods, and though they had no notice of the claim of the real owners.—*Pease v. Smith*, 122.

A wrongful intent is not an essential element in a conversion.—*Pease v. Smith*, 122.

The bringing of an *ex contractu* action by the owner against some of the wrongdoers is an election to treat the transaction as a sale, and the owner cannot subsequently sue the others for conversion.—*Terry v. Munger*, 140.

The owner of goods wrongfully taken may waive the tort and sue on an implied contract of sale.—*Terry v. Munger*, 140.

Where an infant falsely represents himself to be of age, and induces another to sell him goods, the seller cannot maintain trover against him for the goods.—*Slayton v. Barry*, 168.

Taking the property of another without his consent, by abuse of the process of the law, is of itself a conversion, without a demand and refusal.—*Grainger v. Hill*, 292.

One to whom a promissory note is delivered by the payee to be negotiated, with instructions not to part with the possession of it without receiving the money, and who delivers the note to a third person under the promise of the latter to get it discounted and return the proceeds, is liable to the payee, as for a conversion of the note, for the loss by the appropriation of the proceeds of the note by such third person.—*Laverty v. Snethen*, 496.

Conversion is an unauthorized assumption and exercise of the right of ownership over goods belonging to another, to the exclusion of the owner's rights.—*Laverty v. Snethen*, 497.

An agent who parts with the property of his principal in a way or for a purpose not authorized, is liable for a conversion; but if he parts with it in accordance with his authority, although at a less price, or if he misapplies the avails, or takes inadequate for sufficient security, he is not liable for a conversion.—*Laverty v. Snethen*, 499.

A carrier is not liable for conversion for nonfeasance, but may be liable for negligence.—*Wamsley v. Atlas S. S. Co.*, 501.

Where goods intrusted to a common carrier for transportation are delivered by him through mistake or under a forged order to a wrong person, such misdelivery constitutes a conversion.—*Wamsley v. Atlas S. S. Co.*, 501.

Where property is intrusted to a common carrier for transportation, the loss thereof through theft or negligence is not a conversion.—*Wamsley v. Atlas S. S. Co.*, 502.

Where a box of negatives and prints disappeared from the storeroom of a ship and was found on the ship, but there was no evidence as to the manner of its removal, the carrier was not liable for conversion.—*Wamsley v. Atlas S. S. Co.*, 503.

To constitute a conversion, there must be acts amounting to a repudiation of the owner's right in the property, or an exercise of ownership over it inconsistent with such right, or some act done which destroys or changes the quality of the property.—*Frome v. Dennis*, 505.

Under such circumstances, the failure of the borrower to deliver the property to the owner, upon demand by him after it has been returned to the lender, is not evidence of a conversion.—*Frome v. Dennis*, 507.

One who, having no knowledge of the ownership of property, borrows it of the persons having possession thereof, and, after using it, returns it again to him, supposing him to be the owner, not liable for a conversion, in an action by the true owner.—*Frome v. Dennis*, 507.

A person, though an infant, who hires a horse and wagon to drive to a particular place, and drives beyond such place, is liable for a conversion.—*Freeman v. Boland*, 508.

The finder of an article has such a property therein as will enable him to keep it as against all but the rightful owner, and he may maintain trover for its conversion.—*Armory v. Delamirie*, 509.

In an action of trover for the removal by defendant from a jewel of precious stones, the value of which is not known, and which defendant does not produce, the strongest presumption is against him, and the measure of damages is the value of the best stones that would fit the socket.—*Armory v. Delamirie*, 509.

Possession of property, though wrongfully obtained, is sufficient title to maintain replevin against a stranger.—*Anderson v. Gouldberg*, 510.

Trover will not lie unless at the time of the conversion the possession or right to the immediate possession of the property was in plaintiff.—*Gordon v. Harper*, 511.

Owner of personal property leased to another cannot maintain trover for a conversion pending the demise.—*Gordon v. Harper*, 511.

Sale and delivery, by one tenant in common of personal property, of the entire property as exclusively his own, is a conversion, for which his co-tenant can maintain trover.—*Weld v. Oliver*, 515.

A wrongful taking or wrongful sale constitutes a conversion.—*Howitt v. Estelle*, 516.

A demand is not necessary before action, where the property was wrongfully taken or sold.—*Howitt v. Estelle*, 516.

Purchasing a horse from one who had no right to sell him, and subsequently exercising dominion over him, is a conversion.—*Gilmore v. Newton*, 516.

The accidental loss of bills of exchange by one lawfully in their possession is not a conversion thereof.—*Salt Springs Nat. Bank v. Wheeler*, 519.

Demand and refusal of bills of exchange do not establish a conversion, where they have previously been accidentally lost or destroyed.—*Salt Springs Nat. Bank v. Wheeler*, 519.

Refusal to deliver property on demand is merely evidence of conversion, and is open to explanation.—*Hett v. Boston & M. R. R.*, 521.

Refusal to deliver goods to owner after attachment as property of another did not constitute a conversion, where the company disclaimed dominion over them.—*Hett v. Boston & M. R. R.*, 521.

Where a station agent had doubts as to whether a charge for detention of the car containing plaintiff's goods was lawful, and as to whether the railroad company would insist on payment, his refusal to deliver the goods before obtaining instructions did not constitute conversion.—*Hett v. Boston & M. R. R.*, 522.

The title to property converted is not transferred by the entry of a judgment, but remains in plaintiff until he has received actual satisfaction.—*Miller v. Hyde*, 524.

## CORPORATIONS.

A statement by directors of a tramway company in a prospectus issued by them for the purpose of obtaining subscriptions to shares in the company, that by their charter the company had the right to use steam power instead of horses, when in fact the company had such right only if the consent of the board of trade should be obtained, and such consent was afterwards refused, is not ground for an action of deceit against the directors by one who took shares in the company, relying upon such false representation, if the statement was made by the directors in the honest belief that it was true.—*Derry v. Peek*, 638.

Expressions of opinion as to value of stock *held* not to sustain an action for deceit.—*Lynch v. Murphy*, 655.

## CO-TENANCY.

See "Joint Tenancy and Tenancy in Common."

## COURTS.

See "Contempt"; "Judges"; "Jurisdiction."

Court of general criminal jurisdiction has power to strike from the roll of attorneys practicing in the court the name of an attorney guilty of misconduct which is ground for such an order.—*Bradley v. Fisher*, 532.

## CRIMINAL CONVERSATION.

Action maintainable by husband for loss of consortium with his wife which is implied from criminal conversation of the defendant with her, whether defendant's act was with or against her will, and although it may have caused no actual loss of her services to her husband.—*Bigaouette v. Paulet*, 550.

## CRIMINAL LAW.

Defamatory charge of crime, see "Libel"; "Slander."

Wrongful intent necessary to constitute crime.—*Bessey v. Olliot*, 118.

Lunatic not liable to indictment and punishment.—*Morain v. Devlin*, 126.

## DAMAGES.

Action for tort not maintainable where damages are too remote, contingent, or indefinite.—*Lamb v. Stone*, 19; *Clark v. Chambers*, 100; *Vandenburgh v. Truax*, 85; *Lowery v. Manhattan Ry. Co.*, 90; *Milwaukee & St. P. Ry. Co. v. Kellogg*, 78; *Bowen v. Hall*, 115.

In trespass for sawing off top of fence, plaintiff entitled to recover full value of property destroyed, though fence was improved by defendant's act.—*Fisher v. Dowling*, 44.

Action not maintainable for act not in itself unlawful, where no damage is sustained.—*Roberts v. Roberts*, 63.

Loss of membership in religious society, to which no material advantages are attached, not such special damage as will sustain action for speaking words not actionable in themselves.—*Roberts v. Roberts*, 63.

Where there is a distinct legal wrong, law will presume that damage follows as proximate result.—*Chicago W. D. Ry. Co. v. Rend*, 66.

Obstruction of street by railroad, causing injury to plaintiff's business, is a public nuisance causing special injury to plaintiff, for which he might maintain an action for damages.—*Buchholz v. New York, L. E. & W. R. Co.*, 68.

Where special damage from false publication concerning statue was loss of its sale, evidence of its value as scientific curiosity is immaterial.—*Gott v. Pulsifer*, 70.

Action for libel concerning plaintiff's property not maintainable without proof of special damage.—*Gott v. Pulsifer*, 70.

One who does an illegal or mischievous act, likely to prove injurious to others, is answerable for the consequences directly and naturally resulting therefrom, although he did not intend to do the particular injury which followed.—*Vandeburgh v. Truax*, 85.

That a person under contract of marriage with plaintiff broke off the contract in consequence of words spoken of plaintiff by defendant is such special damage as will sustain an action for slander, although the words are not actionable in themselves.—*Moody v. Baker*, 109.

The estate of a lunatic is responsible in damages for his tortious acts.—*McIntyre v. Sholty*, 123.

No liability results from an injury arising from inevitable accident.—*Harvey v. Dunlop*, 131.

Cancer of the breast, if found to be the result of an injury to plaintiff caused by defendant's negligence, may be considered in estimating damages in an action for such injury.—*Baltimore City Pass Ry. Co. v. Kemp*, 135.

An infant is liable for compensatory damages for entering premises of another and destroying shrubbery and flowers.—*Huchting v. Engel*, 163.

Damages cannot be apportioned between joint tortfeasors.—*Keegan v. Hayden*, 171.

That the injuries complained of were inflicted in a fight engaged in by the parties by mutual consent may be shown in mitigation of damages.—*Barholt v. Wright*, 796.

Words or insults may be considered in mitigation of damages for assault.—*Daniel v. Giles*, 204.

In an action for assault, evidence that the plaintiff had insulted defendant's wife three hours before the time of the alleged assault is inadmissible in mitigation of damages.—*Dupee v. Lentine*, 206.

Words not actionable in themselves may be actionable as causing special damage to the person of whom they are spoken in his office, profession, trade, employment, etc.—*Forward v. Adams*, 315; *Ireland v. McGarvish*, 318.

The law presumes that damages result from the speaking of words charging a physician with gross ignorance and unskillfulness in his profession.—*Secor v. Harris*, 320.

Although one who has entered into a contract to purchase land is influenced to desire to withdraw therefrom by statements as to the vendor's title

made by a third person, if the vendor assents to a rescission of the contract, he cannot recover damages from the third party for the loss of the sale, as it is not the legal consequence of the words spoken.—*Kendall v. Stone*, 384.

Special damage is of the gist of the action for slander of title.—*Wilson v. Dubois*, 387.

An entry upon land of another without his permission, express or implied, or the license or authority of law, constitutes a trespass, for which damages are recoverable, though merely nominal.—*Hatch v. Donnell*, 388; *Newkirk v. Sabler*, 391.

In an action against a sheriff for a wrongful levy of an execution on plaintiff's goods, the fact that the sheriff paid the proceeds of the sale to the judgment creditor will not serve to mitigate the damages.—*Welsh v. Wilson*, 546.

Act causing death of a human being, though clearly involving pecuniary loss, not ground of action for damages at common law.—*Mobile Life Ins. Co. v. Brame*, 624.

Fraud and damage together constitute a cause of action.—*Hickey v. Morrell*, 653.

## DAMS.

Injuries from flowage caused by alteration of dam give right of action.—*Curtice v. Thompson*, 458.

## DEATH.

Action maintainable against owner of tenement house for damages for death of tenant caused by failure of owner to provide fire escapes, as required by statute.—*Willy v. Mulledy*, 30.

No justification admissible where life of one person has been lost by negligence of another, whether by negligent act or negligent omission of duty of the latter.—*Thomas v. Winchester*, 160.

Act causing the death of a human being, though clearly involving pecuniary loss, not the ground of an action for damages at common law.—*Mobile Life Ins. Co. v. Brame*, 624.

Insurance company has no right of action against the person who feloniously or negligently causes the death of a person insured by it, the loss thereby caused the company being too remote and indirect.—*Mobile Life Ins. Co. v. Brame*, 625.

By the common law, actions for injuries to the person abate by death, and cannot be revived or maintained by the executor or the heir.—*Mobile Life Ins. Co. v. Brame*, 626.

Where a wrongful death is caused in one state, an action therefor may be maintained in another state if the statute of the state in which the injury occurred is not inconsistent with the laws or policy of the state where the action is brought.—*Nelson's Adm'r v. Chesapeake & O. Ry. Co.*, 681.

## DECEIT.

See "Fraud."

Action not maintainable where damages are too remote, indefinite, and contingent.—*Lamb v. Stone*, 19.

An action lies against one who induces plaintiff to marry a woman on the false representation that she is virtuous.—*Kujek v. Goldman*, 21.

One inducing sale of goods to another by false representations is liable for the deceit, though he has no interest in the sale and has not colluded with one who has.—*Pasley v. Freeman*, 73.

An infant who falsely represents himself to be of age and induces another to sell him goods is not liable in tort for so obtaining the goods.—*Slayton v. Barry*, 168.

Action maintainable for damages sustained from a false representation made by defendant, knowing it to be false, or without belief in its truth, or recklessly, without caring whether it be true or false.—*Derry v. Peek*, 636.

Proof of actual fraud necessary, in England, to support action to recover damages for deceit.—*Derry v. Peek*, 636.

But a false statement, made through carelessness, and without reasonable ground for believing it to be true, although it may be evidence of fraud, does not, according to the English rule, necessarily constitute fraud; and such a statement, made in the honest belief that it is true, is not fraudulent, and does not render the person making it liable to an action of deceit.—*Derry v. Peek*, 637.

In action of deceit, if fraud be proved, the motive of the person guilty of it is immaterial; it matters not that there was no intention to cheat or injure the person to whom the statement was made.—*Derry v. Peek*, 637.

A statement by directors of a tramway company, in a prospectus issued by them for the purpose of obtaining subscriptions to shares in the company, that by their charter the company had the right to use steam power instead of horses, when in fact the company had such right only if the consent of the board of trade should be obtained, and such consent was afterwards refused, is not ground for an action of deceit against the directors by one who took shares in the company, relying upon such false representation, if the statement was made by the directors in the honest belief that it was true.—*Derry v. Peek*, 638.

Action maintainable, in Massachusetts, for damages for false representations by defendant, in stating, as of his own knowledge, material facts susceptible of knowledge, which were false, although he did not know them to be false; that he believed them to be true is no defense.—*Litchfield v. Hutchinson*, 643.

On a sale of an article for a particular purpose, the suppression by the vendor of a latent defect which makes the article unfit for such purpose is a deceit.—*Grigsby v. Stapleton*, 646.

A statement by a warehouseman in a circular soliciting patronage that the exterior of his warehouse is fireproof is the statement of a matter of fact, not a mere expression of opinion, and if made by him with knowledge that it was false, and with intent to deceive, a person induced thereby to store in the warehouse property which is destroyed by fire communicated to portions of the exterior which are not fireproof, may recover from the warehouseman for the loss so incurred.—*Hickey v. Morrell*, 652.

Expressions of opinion by a promoter of a corporation as to value of its stock do not sustain an action of deceit.—*Lynch v. Murphy*, 655.

When the real quality of property sold is obvious to ordinary intelligence, and the vendor and vendee have equal knowledge or equal means of acquir-

ing information, and the truth or falsity of representations made by the vendor as to its quality may be ascertained by the vendee by the exercise of ordinary inquiry or diligence, and they are not made for the purpose of throwing him off his guard and diverting him from making inquiry and examination, which every prudent person ought to make, the vendee has no ground of action for fraud, though he purchases the property in reliance upon such representations.—*Long v. Warren*, 660.

Action not maintainable by purchaser of a farm against the vendor for false representations by the latter, to induce the purchase, in regard to the absence of a noxious grass from the farm, where it appears that any attempt to find such grass on the farm, made before the purchase, would have disclosed its existence.—*Long v. Warren*, 660.

False representations to a commercial agency as to the financial standing of a firm, made with the intent that they should be communicated to and acted upon by persons interested in the firm's standing, will sustain an action for deceit by persons relying thereon.—*Eaton, Cole & Burnham Co. v. Avery*, 668.

To sustain an action for deceit, the misrepresentations must have been made to plaintiff individually, or as one of the public, or as one of the class to whom they are in fact addressed, or have been intended to influence his conduct in the particular of which he complains.—*Hunnewell v. Duxbury*, 671.

An action for fraudulently inducing plaintiff to take notes of a corporation by false representations of its officers as to the amount of its paid-up capital stock, cannot be maintained by evidence of the falsity of their statement of the amount of paid-up capital stock filed with the state commissioner.—*Hunnewell v. Duxbury*, 672.

In an action founded on deceit, it is necessary to prove that false representations were fraudulently made.—*Humphrey v. Merriam*, 673.

In an action for deceit, it is necessary to show that the false representations were relied on.—*Humphrey v. Merriam*, 673.

False representations as to the value of mining stock will not sustain an action for deceit, where plaintiff did not rely on the statements, but interviewed other persons in regard to the mine, and acted upon the information obtained from them.—*Humphrey v. Merriam*, 673.

An intent to deceive is a necessary element of fraud.—*Humphrey v. Merriam*, 673.

## DEFAMATION.

See "Libel"; "Slander"; "Subornation of Perjury."

## DEMAND.

Purchasers of stolen goods, on reselling them, are guilty of conversion, though no demand was made for the goods while in their possession.—*Pease v. Smith*, 122.

Refusal to deliver personal property to the owner on demand is not necessarily evidence of conversion, if delivery was impossible.—*Frome v. Dennis*, 507.

Where property is wrongfully taken or sold, a demand is not necessary before an action for conversion.—*Howitt v. Estelle*, 516.

Where one purchases a horse in good faith from one who had no right to sell him, and subsequently exercises dominion over him, no demand is necessary before commencing an action for conversion.—*Gilmore v. Newton*, 517.

Not necessary before suit against a sheriff or constable for a wrongful seizure and sale, under execution, of property not belonging to the execution debtor.—*Boulware v. Craddock*, 544.

## DETINUE.

Action of trover a substitute for the action of detinue.—*Gordon v. Harper*, 512.

## DOGS.

See "Animals."

Leading horse tied behind wagon is not negligence contributing to injury by vicious dog.—*Boulester v. Parsons*, 81.

The act of the owner of one of two dogs engaged in a fight, in attempting to part them, is a lawful and proper act, which he may do by proper and safe means, and he is not liable for an injury thereby done to another, which is the result of pure accident, or is involuntary and unavoidable.—*Brown v. Kendall*, 130.

A dog accustomed to bite persons is a public nuisance, and may be killed by any one when found running at large.—*Muller v. McKesson*, 484.

Not being animals *feræ naturæ*, an action at law lies for destroying them, although, at common law, the stealing of them does not amount to larceny.—*White v. Brantley*, 489.

## DOG SPEARS.

Use held not illegal, in a case of injury to a dog; but, it seems, otherwise, in case of injury to a human being.—*Clark v. Chambers*, 103.

## DOORS.

Officer may enter outer door of dwelling peaceably for purpose of serving process upon person within.—*Hager v. Danforth*, 213.

Not lawful for officer, in order to serve civil process, to break open outer door of dwelling of the party, although such dwelling is also used by the party for transaction of business.—*Welsh v. Wilson*, 546.

## DRAINAGE.

Action maintainable for obstructing drain.—*Webb v. Portland Manuf'g Co.*, 39.

Owner of land so situated that surface waters from the land above naturally descend upon and pass over it, may, in good faith, and for the purpose of building upon and improving his land, fill and grade it, although thereby the water is prevented from reaching it, and is detained upon the land above.—*Barkley v. Wilcox*, 434.

## DURESS.

Release of right of action for false imprisonment procured by duress is void.—Guillaume v. Rowe, 238.

## EASEMENTS.

Of light and air, not acquired by prescription of 20 years.—Guest v. Reynolds, 4; Miller v. Woodhead, 7.

## ELECTION OF REMEDIES.

Where, by negligence or wrongful act on the part of a common carrier of passengers, a personal injury is suffered by a passenger, he may sue for a breach of the contract, if there is one, or, at his election, may proceed as for a tort.—Baltimore City Pass. Ry. Co. v. Kemp, 137.

The bringing of an *ex contractu* action by the owner against some of the wrongdoers is an election to treat the transaction as a sale, and the owner cannot subsequently sue the others for conversion.—Terry v. Munger, 140.

## ELECTIONS AND VOTERS.

Violation of the right to vote at election a ground of action.—Smith v. Thackerah, 38.

## ELEVATED RAILROADS.

Action maintainable for personal injuries to plaintiff from being run over on the street by horse caused to run away by fire negligently allowed to fall upon him from locomotive on defendant's elevated railway.—Lowery v. Manhattan Ry. Co., 88.

## ENGLISH DOCTRINE.

Of ancient lights, not applicable in Illinois.—Guest v. Reynolds, 4; Miller v. Woodhead, 7.

That judges, counsel, parties, and witnesses are absolutely exempted from liability to an action for defamatory words published in course of judicial proceedings, generally adopted in the American courts, with the qualification, as to parties, counsel, and witnesses, that, in order to be privileged, their statements must be pertinent and material to the case.—Rice v. Coolidge, 26.

Action maintainable for speaking words imputing a criminal offense punishable corporally, though not indictable.—Webb v. Beavan, 305.

That where highway is obstructed temporarily, a traveler has a right to go upon adjoining lands, without being guilty of trespass, recognized in America.—Campbell v. Race, 409.

A false statement, made through carelessness and without reasonable ground for believing it to be true, although it may be evidence of fraud, does not, according to the English rule, necessarily constitute fraud; and such a

statement, made in the honest belief that it is true, is not fraudulent, and does not render the person making it liable to an action of deceit.—*Derry v. Peek*, 641.

## EQUITY.

Will restrain repetition or continuance of injurious act which may become the foundation or evidence of an adverse right.—*Webb v. Portland Manufg Co.*, 39.

Acquiescence or laches may bar equitable relief against a nuisance.—*Campbell v. Seaman*, 423.

A nuisance will be restrained, in order to prevent irreparable injury and a multiplicity of suits, even though the injury is only occasional.—*Campbell v. Seaman*, 423.

Although equity will not interfere to secure to a party a legal right of no value to him, but leave him to his remedy at law, it will not restrain a party from enforcing his legal right upon the ground that it is of no value.—*Clinton v. Myers*, 440.

Will restrain pollution of a water course by acts which tend to create a nuisance of a continuous and constantly accruing nature, for which an action at law can furnish no adequate relief.—*Merrifield v. Lombard*, 442.

## EVIDENCE.

On the question of the probability that a person whose death was caused by a fire in a tenement house would have escaped had a fire escape been provided, as required by law, it may be inferred, from the construction of the house, and the structure of fire escapes, where one would probably have been placed.—*Willy v. Mulledy*, 31.

The facts that a person, whose death was caused by a fire in a tenement house, knew that there was a scuttle in the roof, had time after notice of the fire to reach it, and made efforts to escape, are sufficient to justify a jury in finding that such person tried to escape in that direction, and failed for want of a ladder to the scuttle, which the owner had not provided as required by the statute.—*Willy v. Mulledy*, 32.

Where act or omission complained of is not a distinct wrong, damages must be proved to sustain action.—*Chicago W. D. Ry. Co. v. Rend*, 66.

In an action of assault, evidence of insults occurring three hours before the time of the alleged assault is inadmissible.—*Dupee v. Lentine*, 206.

In an action against a teacher for assault and battery in whipping a pupil, evidence of habitual misconduct of the pupil prior to the punishment is admissible on behalf of defendant.—*Sheehan v. Sturges*, 211.

In an action of trover, on the question of the possession by defendant of the property in question, declarations of himself and of the person from whom he received possession, contemporaneous with the transfer and indicative of its character, are admissible as part of the *res gestæ*.—*Frome v. Dennis*, 507.

Where a passenger jumped from a moving car to escape a threatened collision and was injured, it was competent on the question of contributory negligence to show the action of the other passengers.—*Twomley v. Central Park, N. & E. R. R. Co.*, 598.

## EXCAVATIONS.

Occupant of land lawfully making excavation therein in ordinary manner, not near highway, not liable to injuries to trespasser falling into excavation.—*Gramlich v. Wurst*, 13.

One making excavations in land is liable for injury caused thereby to land of adjoining tract in its natural condition, even though there was no negligence in making such excavations.—*Gilmore v. Driscoll*, 45.

One making excavations in land is not liable, in the absence of negligence, for injury to improvements on adjoining tract, unless adjoining owner has acquired right to support thereof by grant or prescription.—*Gilmore v. Driscoll*, 48.

That land in which one makes excavations does not belong to him does not affect his liability for injury to adjoining lot.—*Gilmore v. Driscoll*, 49.

Injuries to adjoining property, caused by excavations in mining, accrues at time of injury, and not at time of excavation.—*Bonomi v. Backhouse*, 66.

## EXECUTION.

Where an attorney for judgment creditors issued a void execution for arrest of the judgment debtor, the judgment creditors were liable.—*Guillaume v. Rowe*, 238.

A sheriff or constable who, under an execution, seizes and sells property not belonging to the judgment debtor, though in his possession, is a mere trespasser, and liable to an action by the owner of the property without any demand before suit.—*Boulware v. Craddock*, 544.

Levy of execution by breaking outer door of dwelling of execution debtor, invalid; and the fact that the sheriff making such levy sold the goods and paid the proceeds to the execution creditor is not available to him in mitigation of damages.—*Welsh v. Wilson*, 546.

## EXPLOSIVES.

See "Blasting"; "Gas."

Keeping or manufacturing gunpowder or fireworks, being a lawful business, does not necessarily constitute a nuisance; whether it does depends upon the locality, the quantity, and the surrounding circumstances, and not entirely upon the degree of care used.—*Heeg v. Licht*, 450.

## FALSE IMPRISONMENT.

One who instigates and procures an officer to arrest another upon a void warrant is liable to an action therefor.—*Rice v. Coolidge*, 27.

Obstructing the passage of a person in one direction only along a portion of a public highway, he being free to go in another direction, does not amount to an imprisonment for which he can maintain an action for false imprisonment.—*Bird v. Jones*, 215.

Where a tax officer, being present in the room with plaintiff, called upon her to pay a tax, which she declined doing until arrested, and then told her

he arrested her, whereupon she yielded and paid the tax, this amounted to an arrest and imprisonment, though he did not lay his hand upon her.—*Pike v. Hanson*, 222.

Words are sufficient to constitute imprisonment, if they impose a restraint on the person.—*Pike v. Hanson*, 222.

Detention of passenger by carrier, for the purpose of enforcing payment of fare, illegal.—*Lynch v. Metropolitan El. Ry. Co.*, 223.

Written complaint on oath that certain goods were stolen and that complainant "has probable cause to suspect and does suspect" that a certain person stole them, without further proof, does not give a justice jurisdiction to issue a warrant for the arrest of the person charged, so as to protect him from liability for false imprisonment.—*Blodgett v. Race*, 227.

Person making sworn complaint before a justice is not liable for unlawful imprisonment, even if acts of justice were extrajudicial.—*Grove v. Van Duyn*, 233.

A judicial officer having general powers is responsible for causing an arrest in all cases over which he has cognizance, unless the case is, by complaint or other proceeding, put colorably under his jurisdiction.—*Grove v. Van Duyn*, 233.

A complainant, obtaining a warrant from a magistrate having no jurisdiction of the cause and inducing an officer to arrest defendant thereon, is liable, even though the warrant is valid on its face.—*Emery v. Hapgood*, 236.

Release of right of action for false imprisonment procured by duress is void.—*Guilleapme v. Rowe*, 238.

Where an attorney for judgment creditors issued a void execution for arrest of the judgment debtor, the judgment creditors were liable.—*Guillaume v. Rowe*, 238.

Complaint held insufficient to justify warrant for arrest, so as to protect officer.—*Elsemore v. Longfellow*, 240.

An officer making an arrest under process issued by a magistrate is liable for false imprisonment, if the process is void on its face.—*Elsemore v. Longfellow*, 240.

Liability for arrest under void process attaches when wrong is committed, without such process being vacated or set aside; but process merely irregular must be vacated or annulled before an action can be maintained for damages from its enforcement.—*Fischer v. Langbein*, 242.

Under a constitutional provision that no warrant to seize any person shall issue without special designation of the person to be seized, a warrant describing the accused as "a person whose name is not known, but whose person is well known, of V., of the county of K.," is insufficient to protect an officer making an arrest thereunder.—*Harwood v. Siphers*, 247.

Where there is no conflict in the evidence in actions for false imprisonment, the question of probable cause is one of law.—*Burns v. Erben*, 251.

In an action against an officer for false imprisonment, defense that a felony has been committed must be specifically pleaded.—*White v. McQueen*, 253.

Arrest without warrant, where warrant is by law necessary, constitutes false imprisonment.—*Quinn v. Helsel*, 255; *Phillips v. Trull*, 259.

The gravamen of the offense of false imprisonment is the unlawful detention of another without his consent, and malice is not an essential element thereof.—*Hobbs v. Ray*, 264.

An action for false imprisonment will not lie for an arrest made under lawful process, though wrongfully obtained; the remedy being an action for malicious prosecution.—*Hobbs v. Ray*, 264.

One causing the arrest of an innocent person on a charge of crime, upon a groundless suspicion, is liable to him in damages therefor.—*Carl v. Ayers*, 271.

## FALSE REPRESENTATIONS.

See "Deceit"; "Fraud."

## FELONY.

An officer is justified in making an arrest without warrant, though no felony has been committed, if he has reasonable ground to suspect that one has been.—*Burns v. Erben*, 250.

An arrest by private individual is authorized only where a felony has in fact been committed and there was reasonable ground to suspect the person arrested.—*Burns v. Erben*, 250.

In an action against an officer for false imprisonment, defense that a felony has been committed must be specifically pleaded.—*White v. McQueen*, 253.

## FENCES.

Fence which obstructs access of light and air to house of adjoining owner not ground of action unless adverse right is invaded.—*Guest v. Reynolds*, 4.

Owner or occupant of land not required to fence it to prevent injuries to trespassers from falling into lawful excavation, not near highway.—*Gramlich v. Wurst*, 13.

Tenant or owner not obliged to fence against adjoining owner or occupier, at common law, except by prescription; and, in that case, only against cattle rightfully in the adjoining close.—*Lawrence v. Combs*, 414.

## FERRIES.

Action on the case does not lie for disturbance of a ferry franchise, where the statute only gave remedy for penalty.—*Almy v. Harris*, 35.

## FIRE ESCAPES.

Failure of owner of tenement house to comply with statute requiring fire escapes to be provided therefor is a breach of duty, for which he is liable to a tenant for damage thereby caused to the latter.—*Willy v. Mulledy*, 30.

## FIRES.

A statute providing that a railroad shall be responsible to owner of property injured by fire is not unavailing, because not providing remedy or prescribing form of action.—*Stearns v. Atlantic & St. L. R. Co.*, 33.

The burning of plaintiff's property by fire communicated from a building which had been set on fire by sparks allowed to fall upon it by negligence on defendants' part is not too remote from such negligence to permit a recovery therefor, if the burning of his property was a result naturally and reasonably to have been expected from the burning of such building, under the circumstances, and the result of the continued effect of the sparks falling on the building, without the aid of other causes not reasonably to have been expected.—*Milwaukee & St. P. Ry. Co. v. Kellogg*, 76.

Action maintainable for personal injuries to plaintiff from being run over in the street by horse caused to run away by fire negligently allowed to fall upon him from locomotive on defendant's elevated railway.—*Lowery v. Manhattan Ry. Co.*, 88.

Where defendant was negligent in keeping oil upon a platform which was subsequently fired by carelessness of another, the acts of defendant are not the proximate cause of the fire.—*Stone v. Boston & A. R. Co.*, 98.

## FIREWORKS.

Keeping or manufacturing gunpowder or fireworks, being a lawful business, does not necessarily constitute a nuisance; whether it does depends upon the locality, the quantity, and the surrounding circumstances, and not entirely upon the degree of care used.—*Heeg v. Licht*, 450.

## FRAUD.

See "Deceit."

Purchasing from debtor property subject to attachment, and aiding him to abscond, not ground of action for fraud by creditor having no lien or claim on such property.—*Lamb v. Stone*, 19.

An action lies against one who induces plaintiff to marry a woman on the false representation that she is virtuous.—*Kujek v. Goldman*, 21.

One inducing sale of goods to another by false representations is liable for the deceit, though he has no interest in the sale and has not colluded with one who has.—*Pasley v. Freeman*, 73.

An unreasonable delay in performance of an agreement to do a certain act may be intended to effect a scheme to gain an advantage by unlawful means and with fraudulent motives, and such acts may, therefore, sustain action for a tort, such breach of contract being one of the elements constituting the tort.—*Rich v. New York Cent. & H. R. R. Co.*, 149.

In an action of tort for an alleged fraud, one of the elements of which is a breach of a contract by an unreasonable delay in performance of the contract obligation, proof of the contract, and of the delay in performance thereof, and of the reasons therefor, are essential links in the chain, and the relative situations of the parties and other circumstances which are elements of the transaction may be shown.—*Rich v. New York Cent. & H. R. R. Co.*, 150.

Representations made to a father to induce him to purchase a gun for the use of his son, known by the vendor making them to be false, by which the son is induced to use the gun, operate as a distinct fraud on the son; and he may maintain an action against the vendor for injuries sustained in consequence thereof.—*Winterbottom v. Wright*, 154.

An infant who falsely represents himself to be of age and induces another to sell him goods is not liable in trover against him for the goods.—*Slayton v. Barry*, 168.

Proof that a false representation was made with knowledge of its falsity, or without belief in its truth, or recklessly, without caring whether it be true or false, is sufficient proof of actual fraud, required by the English rule, to support an action for damages for deceit.—*Derry v. Peek*, 636.

In an action of deceit, if fraud be proved, the motive of the person guilty of it is immaterial; it matters not that there was no intention to cheat or injure the person to whom the statement was made.—*Derry v. Peek*, 637.

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Action maintainable for fraud, coupled with damage.—*Hickey v. Morrell*, 653.

Expressions of opinion by a promoter of a corporation as to value of its stock do not sustain an action of deceit.—*Lynch v. Murphy*, 655.

Every contracting party not in actual fault has a right to rely on the express statement of an existing fact, the truth of which is known to the contracting party who made it and unknown to the party to whom it is made, when such statement is the basis of a material engagement.—*Hingston v. L. P. & J. L. Smith Co.*, 664.

A party, contracting to dredge a harbor and being some distance therefrom at the time, is entitled to rely on the representations of the other party, who has done a portion of the work, as to the thickness of the rock to be removed, and, if such representations are false, and known to the party making them to be so, and are relied upon, he is not bound by the contract.—*Hingston v. L. P. & J. A. Smith Co.*, 664.

Representations made after soundings have been taken in a harbor and a chart thereof made, with which the party making the representations was familiar and the other party not, were not mere expressions of opinion, but were matters of fact which could be relied on, though not accompanied with specific statements as to actual measurements having been made.—*Hingston v. L. P. & J. A. Smith Co.*, 665.

False representations to a commercial agency as to the financial standing of a firm, made with the intent that they should be communicated to and acted upon by persons interested in the firm's standing, will sustain an action for fraud by persons relying thereon.—*Eaton, Cole & Burnham Co. v. Avery*, 668.

To sustain an action for fraud, the misrepresentations must have been made to plaintiff individually, or as one of the public, or as one of the class to whom they are in fact addressed, or have been intended to influence his conduct in the particular of which he complains.—*Hunnewell v. Duxbury*, 671.

An action for fraudulently inducing plaintiff to take notes of a corporation by false representations of its officers as to the amount of its paid-up capital stock cannot be maintained by evidence of the falsity of their statement of the amount of paid-up capital stock filed with the state commissioner.—*Hunnewell v. Duxbury*, 672.

In an action founded on fraud, it is necessary to prove, not only that the representations were fraudulently made, but also that plaintiff believed and relied upon them.—*Humphrey v. Merriam*, 673.

Plaintiff is not entitled to recover for fraud in the sale of mining stock, where it appears that he did not rely on the statements of defendant, but interviewed other persons in regard to the mine and acted on the information so obtained.—*Humphrey v. Merriam*, 673.

An intent to deceive is a necessary element of fraud.—*Humphrey v. Merriam*, 673.

## FRAUDULENT PURCHASE.

Of property of debtor liable to attachment, not ground of action by creditor for damages for the fraud; the remedy being by suit to avoid the sale, or by attachment.—*Lamb v. Stone*, 17.

## GAS.

Action maintainable for injuries from explosion of gas against defendants, by whom it was allowed to escape into plaintiff's premises, although the explosion was caused by negligence of a third person.—*Clark v. Chambers*, 105.

## GUNPOWDER.

The mere keeping of gunpowder in dangerous proximity to the premises of another is a nuisance, rendering the person keeping it liable for injuries caused by its explosion, irrespective of the question of his negligence.—*Heeg v. Licht*, 449.

## GUNS.

Action maintainable for personal injuries caused by discharge of gun left loaded by defendant's negligence, although negligence of third person intervened as immediate cause of accident.—*Clark v. Chambers*, 102; *Thomas v. Winchester*, 161.

Pointing an unloaded gun at one who supposes it to be loaded, although within the distance it would carry if loaded, is not, without more, an assault punishable criminally, although it may sustain a civil action for damages.—*Chapman v. State*, 185.

## HIGHWAYS.

Abutting owner entitled to injunction to compel railroad company to restore street crossing.—*Buchholz v. New York, L. E. & W. R. Co.*, 68.

One unlawfully placing dangerous obstruction in public highway is liable for personal injuries thereby occasioned to a traveler, although the immediate cause of the accident was the intervening act of another.—*Clark v. Chambers*, 106.

Obstruction of passage of a person in one direction only along a portion of a public highway, he being free to go in another direction, does not amount to an imprisonment for which he can maintain an action for false imprisonment.—*Bird v. Jones*, 215.

For appropriation of soil of a public highway trespass lies by the owner of land through which highway passes.—*Gidney v. Earl*, 390.

Obstruction of highway an excuse for entry on adjoining land.—*Newkirk v. Sabler*, 392; *Campbell v. Race*, 409.

That the injuries were caused by the negligence, in covering the excavation, of servants of contractors for that work, who had contracted to do it properly, does not relieve from liability the persons who procured it to be done, and did not object to it, and continued the excavation in its unsafe condition, they being bound, at their peril, to make and at all times keep the street as safe as it would have been if the excavation had not been made.—*Congreve v. Smith*, 454.

Persons who, without authority, make or continue a covered excavation in a public street or highway for a private purpose, are liable for all injuries to individuals resulting from the street or highway being thereby less safe for its appropriate use, irrespective of the question of negligence in those who make the excavation.—*Congreve v. Smith*, 454.

One driving too fast on the public highway is liable for running over a domestic animal therein, where his negligence was the immediate cause of the injury, although the injured animal was wrongfully and negligently left in the highway by his owner; the latter's negligence being only remote.—*Davies v. Mann*, 571.

A child two years of age, who, while under the care of an adult sister, goes upon the track of a horse railroad, and is there run over by the carelessness of the driver of a car thereon, is not deprived of a right of action for the injury, although the sister's carelessness of supervision was, in part, the cause of the injury.—*Newman v. Phillipsburg Horse Car R. Co.*, 585.

## HOMICIDE.

Self-defense an excuse, where the person assailed had reason to believe that his assailant intended to do him great bodily harm, and that he was in danger of such harm, and that no other means could effectually prevent it.—*Commonwealth v. O'Malley*, 200.

## HORSE RAILROADS.

See "Street Railroads."

## HORSES.

Action maintainable for personal injuries to plaintiff from being run over on the street by horse caused to run away by fire negligently allowed to fall upon him from locomotive on defendant's elevated railway.—*Lowery v. Manhattan Ry. Co.*, 88.

Action maintainable for injuries caused by defendant's horse, left unattended in the street, although immediate cause of injury was the intervening act of a third person.—*Clark v. Chambers*, 103; *Thomas v. Winchester*, 161.

Action maintainable for injuries caused by plaintiff's horses taking fright at a stream of water allowed by defendants to spout up in the road.—*Clark v. Chambers*, 105.

One who hires a horse to drive to a particular place, and drives beyond the place or in another direction, is liable for a conversion.—*Freeman v. Boland*, 508.

## HUMAN LIFE.

No justification admissible where life of one person has been lost by negligence of another, whether by negligent act or negligent omission of duty of the latter.—*Thomas v. Winchester*, 160.

Negligence cannot be imputed by law to a person in his effort to save the life of another in extreme peril, unless made under such circumstances as to constitute rashness in the judgment of prudent persons.—*Eckert v. Long Island R. Co.*, 600.

## HUSBAND AND WIFE.

Husband may recover for slander of wife, causing, as a natural consequence, injury to him by loss of trade and custom in his business.—*Van Horn v. Van Horn*, 296.

Action maintainable by husband for loss of consortium with his wife, which is implied from criminal conversation of the defendant with her, whether defendant's act was with or against her will, and although it may have caused no actual loss of her services to her husband.—*Bigaouette v. Paulet*, 550.

## ICE.

Action not maintainable for injuries from slipping on ice formed in street, against one who allowed the water forming it to flow into the gutter without being aware of an obstruction to its passing into the sewer which caused it to spread into the street and become frozen.—*Clark v. Chambers*, 107.

## IMPLIED CONTRACTS.

The owner of goods wrongfully taken may waive the tort and sue on an implied contract of sale.—*Terry v. Munger*, 140.

## IMPRISONMENT.

See "False Imprisonment."

Includes, besides mere loss of freedom to go where one pleases, restraint within limits defined by an exterior will or power.—*Bird v. Jones*, 216.

Actual violence not necessary to constitute.—*Bird v. Jones*, 216.

Words are sufficient to constitute imprisonment, if they impose a restraint on the person.—*Plike v. Hanson*, 222.

Municipal corporation cannot enforce obedience to its by-laws or ordinances by imprisonment, unless expressly authorized so to do by statute.—*Lynch v. Metropolitan El. Ry. Co.*, 225.

## IMPUTED NEGLIGENCE.

In cases of injuries to an infant of tender years, received through the negligence of others, the law imputes to the infant the negligence of its parents.—*Mangam v. Brooklyn R. Co.*, 580.

Though negligence of parents in exposing a child non sui juris to danger may be imputed to the child, still if the child has not committed an act which would constitute negligence in a person of years of discretion, an injury by the negligence of another cannot be defended on the alleged negligence of the parents.—*McGarry v. Loomis*, 584.

Where a child four years old was injured while exercising what would be regarded as ordinary care in an adult, the question of the negligence of its parents is immaterial.—*McGarry v. Loomis*, 584.

A child of tender years is not chargeable with the negligence of the person having him in charge.—*Newman v. Phillipsburg Horse Car R. Co.*, 588.

One who hires a public hack, and gives directions to the driver as to the place to which he wishes to be conveyed, but exercises no other control over him, is not chargeable with the negligence of such driver.—*Little v. Hackett*, 595.

## INDEMNITY.

A village may recover from an abutting owner the amount which it is compelled to pay a person injured by the defective condition of a sidewalk caused by him.—*Trustees of Village of Canandaigua v. Foster*, 176.

## INDEPENDENT CONTRACTORS.

An owner of real estate is not liable for the negligence of a contractor or his employes in removing rock from his premises by blasting.—*Berg v. Parsons*, 606.

An owner of real estate who engages a contractor to remove rock from his premises is not liable for damages caused by the contractor's negligence, on the theory of an obligation to use care in selecting such contractor.—*Berg v. Parsons*, 606.

## INFANCY.

Infant may recover for injuries from dangerous appliance adjoining a public way, although received while trespassing.—*Gramlich v. Wurst*, 14; *Clark v. Chambers*, 104.

To render an infant who has hired a horse liable for trespass, he must do some positive act which amounts to an election to disaffirm the contract.—*Moore v. Eastman*, 166.

An infant of six is liable for compensatory damages for entering premises of another and destroying shrubbery and flowers.—*Huchting v. Engel*, 163.

Where an infant who has hired a horse willfully and intentionally injures the animal, an action for trespass will lie for the tort, but not if the injury occurred through unskillfulness.—*Moore v. Eastman*, 166.

An infant who falsely represents himself to be of age and induces another to sell him goods is not liable in tort for so obtaining the goods.—*Slayton v. Barry*, 168.

Corporal punishment of pupil by teacher to enforce compliance with proper rules for good conduct and order of school justifiable, if inflicted with sound discretion and judgment, and adapted to the offender as well as to the offense.—*Sheehan v. Sturges*, 211.

Infant who hires a horse and wagon to drive to a particular place, and drives beyond such place, is liable for a conversion.—*Freeman v. Boland*, 508.

A child of such tender years as to be incapable of exercising judgment and discretion cannot be charged with contributory negligence.—*Twist v. Winona & St. P. R. Co.*, 574.

But even a child is bound to use such reasonable care as one of his age and mental capacity is capable of using, and his failure to do so is negligence.—*Twist v. Winona & St. P. R. Co.*, 575.

The conduct of a boy nearly 10 years old, of average intelligence, familiar in a general way with the working of a railroad turntable, knowing that it was dangerous to play upon it, and that so doing was forbidden by the railroad company, and having been warned by his father not to go upon it, who nevertheless engages with other boys in swinging upon it while in motion, and is injured thereby, is such contributory negligence as will defeat a recovery for such injury, although he may not have been of sufficient age and discretion to understand the full extent of the danger.—*Twist v. Winona & St. P. R. Co.*, 575.

An infant three or four years of age is incapable of contributory negligence.—*Mangam v. Brooklyn R. Co.*, 581.

Where a child four years old was injured while exercising what would be regarded as ordinary care in an adult, the question of the negligence of its parents is immaterial.—*McGarry v. Loomis*, 584.

A child two years of age, who, while under the care of an adult sister, goes upon the track of a horse railroad, and is there run over by the carelessness of the driver of a car thereon, is not deprived of a right of action for the injury, although the sister's carelessness of supervision was, in part, the cause of the injury.—*Newman v. Phillipsburg Horse Car R. Co.*, 585.

A child of tender years is not chargeable with negligence of the person having him in charge.—*Newman v. Phillipsburg Horse Car R. Co.*, 588.

A person seeing a small child on a railroad track in extreme peril from a rapidly approaching train owes to the child the duty to rescue it if he can do so without incurring great danger to himself, and the law will not impute negligence to an effort by him to rescue the child, unless made under such circumstances as to constitute rashness in the judgment of prudent persons.—*Eckert v. Long Island R. Co.*, 599.

## INJUNCTION.

May be granted to restrain repetition or continuance of injurious act which may become the foundation or evidence of an adverse right.—*Webb v. Portland Manuf'g Co.*, 39.

Abutting owner entitled to injunction to compel railroad company to restore street crossing.—*Buchholz v. New York, L. E. & W. R. Co.*, 68.

Writ of injunction not a matter of grace, but of right, in a proper case; and will be granted to restrain irreparable injury, whether it be to the enjoyment of the necessities or the luxuries of life.—*Campbell v. Seaman*, 422.

The destruction of ornamental and useful trees and vines by the vapors and gases from a brickkiln is such irreparable injury as a court of equity will enjoin.—*Campbell v. Seaman*, 422.

An injunction restraining the ringing of a factory bell, used to notify employés, before a certain hour in the morning, does not give a vested right which the Legislature is powerless to take away by a statute legalizing the ringing of such bell before that hour, and on a bill of review in such case the injunction will be dissolved.—*Sawyer v. Davis*, 473.

## INNKEEPERS.

Cannot detain person of guest to secure payment of bill.—*Lynch v. Metropolitan El. Ry. Co.*, 224.

To say of a keeper of a house of public entertainment that he is a "dangerous man," a "desperate man," and that the speaker is "afraid to go in his house alone," is not ground for an action of slander, as affecting such person in his business, since the words do not relate to his business character, or charge any delinquency in his business.—*Ireland v. McGarvish*, 318.

## INSANITY.

The estate of a lunatic is responsible in damages for his tortious acts.—*McIntyre v. Sholty*, 123.

Not ground of exemption from liability for tort.—*Morain v. Devlin*, 126.

Defense to crime.—*Morain v. Devlin*, 126.

Publication in newspaper of statement imputing insanity to a teller in a bank, libelous per se, as tending to injure him in his employment.—*Moore v. Francis*, 335.

## INSURANCE.

Insurance company has no right of action against the person who feloniously or negligently causes the death of a person insured by it, the loss thereby caused the company being too remote and indirect.—*Mobile Life Ins. Co. v. Brame*, 625.

## INTENT.

One who does an illegal or mischievous act, likely to prove injurious to others, is answerable for the consequences directly and naturally resulting therefrom, although he did not intend to do the particular injury which followed.—*Vandenburgh v. Truax*, 85.

Wrongful intent not necessary to constitute tort in cases of trespass.—*Bessey v. Olliot*, 118; *Guille v. Swan*, 120; *Hobart v. Hagget*, 491; *Dexter v. Cole*, 492.

Wrongful intent necessary to constitute tort, in cases of fraud, malicious prosecution, etc.—*Guille v. Swan*, 121, note.

The rule that there can be no contribution among wrongdoers applies only to cases where there has been an intentional violation of law.—*Bailey v. Bussing*, 174.

Present intention, as well as present ability, to use violence against the person of another, necessary to constitute criminal assault.—*Chapman v. State*, 186.

Words accompanying menacing acts and indicating that there is no intent to do actual violence may be considered on the question whether such acts constitute an assault.—*State v. Crow*, 190.

For a conviction of mayhem for an injury during a conflict, it is not necessary that the accused should have formed the intent before engaging in the conflict.—*Barholt v. Wright*, 196.

Nor in cases of conversion of personal property.—*Lavery v. Snethen*, 409.

In an action of deceit, if fraud be proved, the motive of the person guilty of it is immaterial; it matters not that there was no intention to cheat or injure the person to whom the statement was made.—*Derry v. Peek*, 637.

An intent to deceive is a necessary element of fraud and deceit.—*Humphrey v. Merriam*, 673.

## JOINT TENANCY AND TENANCY IN COMMON.

Trespass is maintainable by one tenant in common against another, upon an actual ouster.—*Murray v. Hall*, 403.

Sale and delivery, by one tenant in common of personal property, of the entire property as exclusively his own, is a conversion, for which his co-tenant can maintain trover.—*Weld v. Oliver*, 515.

## JOINT TORT FEASORS.

Personal privilege from civil action of one of two joint wrongdoers does not exempt the other from liability.—*Rice v. Coolidge*, 27.

The liability for torts is joint and several.—*Kirby v. President, etc., of Delaware & H. Canal Co.*, 170.

No apportionment of damages between.—*Keegan v. Hayden*, 171.

The rule that there can be no contribution among wrongdoers applies only to cases where there has been an intentional violation of the law, or where the wrongdoer is to be presumed to have known that the act was unlawful.—*Bailey v. Bussing*, 174.

Release of one joint tort-feasor releases the others.—*Gunther v. Lee*, 179.

In a release to one of several joint tort-feasors, a proviso that the right to recover against the other shall not be affected is void.—*Gunther v. Lee*, 180.

Parties advising or aiding in committing trespass are liable, though not personally present at the time of its commission.—*Bell v. Miller*, 181.

## JUDGES.

Judge not liable to action for false imprisonment for awarding a capias upon affidavits which do not disclose a sufficient cause for arrest.—*Fischer v. Langbein*, 244.

Judges of courts of superior or general jurisdiction not liable to civil actions for their judicial acts, even when such acts are in excess of their jurisdiction, and are alleged to have been done maliciously or corruptly; although there is no such exemption where there is clearly no jurisdiction over the subject-matter, and such want of jurisdiction is known to the judge.—*Bradley v. Fisher*, 531.

Where a court has power to make an order striking the name of an attorney from the roll of attorneys practicing in the court, error in not citing the attorney, before making such an order, to show cause why it should not be made, however it may affect the validity of the act, does not make it any the less a judicial act, nor does it render the judge making the order liable in damages to the attorney, as though the court had proceeded, without jurisdiction.—*Bradley v. Fisher*, 534.

## JUDGMENT.

Any person not a party to a former action and not in privity with a party may, in a collateral action, impeach the judgment.—*Rice v. Coolidge*, 27.

Entry of judgment in favor of plaintiff in action for conversion does not transfer title to defendant.—*Miller v. Hyde*, 524.

## JURISDICTION.

A judicial officer having general powers is responsible for causing an arrest in all cases over which he has cognizance, unless the case is by complaint or other proceeding put colorably under his jurisdiction.—*Grove v. Van Duyn*, 233.

Person making sworn complaint before a justice is not liable for unlawful imprisonment, even if acts of justice were extrajudicial.—*Grove v. Van Duyn*, 233.

Complaint insufficient to give justice jurisdiction, so as to relieve him from liability in issuing warrant thereon.—*Grove v. Van Duyn*, 233.

Power of court to entertain jurisdiction of an action or proceeding does not depend upon the existence of a substantial cause of action, but upon the performance by the party of the prerequisites authorizing it to determine whether one exists or not.—*Fischer v. Langbein*, 244.

Order or process based on a decision of the court, involving the exercise of the judicial function, although afterwards set aside as erroneous, is not void, and does not subject the party procuring it to an action for damages thereby inflicted.—*Fischer v. Langbein*, 245.

Public officer not liable to civil action for a judicial determination, however erroneous or malicious, if he had jurisdiction of the case, and was authorized to determine it.—*Bradley v. Fisher*, 206; *Weaver v. Devendorf*, 525.

## JUSTICES OF THE PEACE.

Justice issuing warrant for arrest of person on charge of crime, without jurisdiction, liable for false imprisonment.—*Blodgett v. Race*, 227.

Complaint insufficient to give justice jurisdiction, so as to relieve him from liability in issuing warrant thereon.—*Grove v. Van Duyn*, 233.

## JUSTIFICATION.

Self-defense a justification of assault and battery.—*Scribner v. Beach*, 197; *Commonwealth v. O'Malley*, 200.

Words and insult will not justify an assault.—*Daniel v. Giles*, 204.

In an action of assault, evidence of insults occurring three hours before the time of the alleged assault is inadmissible.—*Dupee v. Lentine*, 206.

The truth of the charge that a man had the venereal disease is a justification, in an action for slander by speaking words imputing such charge.—*Golderman v. Stearns*, 313.

In civil actions for libel, proof of the truth of the matter charged as defamatory is a complete justification, without showing that it was published with good motives, and for justifiable ends.—*Castle v. Houston*, 350.

A charge of being a thief cannot be justified by showing that the person accused is guilty of cheating, fraud, or false pretenses.—*Youngs v. Adams*, 352.

Justification for libel must be as broad as the libel.—*Stilwell v. Barter*, 353.

The speaking of defamatory words is justified by a privileged occasion therefor, although the communication was made voluntarily, if it was made in good faith, without malice, in the honest belief of its truth, and under the conviction that it was a duty to make it.—*Fresh v. Cutter*, 356.

## KNOWLEDGE.

To support an action of deceit for making a false representation, knowledge by defendant of its falsity is not always necessary.—*Derry v. Peek*, 636; *Litchfield v. Hutchinson*, 643.

## LACHES.

May be a bar to equitable relief against nuisance.—*Campbell v. Seaman*, 423.

## LANDLORD AND TENANT.

Owner of building letting rooms in it, with right to tenant to go upon roof of extension to dry clothes, not liable for injuries to visitor of tenant received by falling from window of latter's rooms through unprotected skylight in roof of extension.—*Miller v. Woodhead*, 9.

Failure of owner of tenement house to comply with statute requiring fire escapes to be provided therefor is a breach of duty for which he is liable to a tenant for damages thereby caused to the latter.—*Willy v. Mulledy*, 30.

Owner of premises having so constructed a cesspool thereon that the offensive matter deposited in it by his tenants necessarily percolates through to the adjoining premises is liable equally with the tenants for the injury to the adjoining occupant.—*Fow v. Roberts*, 457.

A tenant for years is not liable for keeping a nuisance as it was used before his tenancy commenced, in the absence of a request to remove it, if he does no new act of itself amounting to a nuisance.—*McDonough v. Gilman*, 460.

A tenant for years, who restores a nuisance to a right of way after the same has been abated, is liable therefor, although the same existed before his tenancy; but merely repairing it after it was injured, but not abated, will not make him liable, if it does not become more of a nuisance thereby.—*McDonough v. Gilman*, 460.

The notice to a tenant, to remove a nuisance which is kept by him in the manner in which it existed when his tenancy commenced, without any act on his part amounting in itself to a nuisance, must be clear and unequivocal, to make him liable for the continuance.—*McDonough v. Gilman*, 462.

The owner of personal property leased to another cannot maintain trover for a conversion pending the demise.—*Gordon v. Harper*, 511.

## LANDMARK.

Removal, when made a statutory offense, involves moral turpitude.—*Young v. Miller*, 302.

## LARCENY.

A statement that plaintiff had her hogs in another's corn, and carried corn away, is not actionable without special damage.—*Stitzell v. Reynolds*, 380.

## LATERAL SUPPORT.

Where lateral support of soil is removed, owner entitled to recover for loss of and injury to soil, not for cost of restoring it or difference in market price.—*Gilmore v. Driscoll*, 50.

Injuries to adjoining property caused by excavations in mining accrue at time of injury, and not at time of excavation.—*Bonomi v. Backhouse*, 66.

## LEASES.

See "Landlord and Tenant."

## LEGAL RIGHTS.

Violation of moral right or duty does not constitute tort.—*Guest v. Reynolds*, 4; *Miller v. Woodhead*, 7; *Gramlich v. Wurst*, 9.

Violation necessary to constitute tort.—*Guest v. Reynolds*, 4; *Miller v. Woodhead*, 7; *Gramlich v. Wurst*, 9; *Rich v. New York Cent. & H. R. R. Co.*, 146.

May be established by common law, in cases of novel impression.—*Rice v. Coolidge*, 28.

Action maintainable for violation of legal rights created by statute.—*Willy v. Mulledy*, 30.

No right of action for negligence unless there is a violation of legal duty.—*Larmore v. Crown Point Iron Co.*, 556.

## LEX LOCI.

See "Conflict of Laws."

## LIBEL.

See "Slander."

Action for libel concerning plaintiff's property not maintainable without proof of special damage.—*Gott v. Pulsifer*, 70.

Where special damage from false publication concerning statue was loss of its sale, evidence of its value as scientific curiosity is immaterial.—*Gott v. Pulsifer*, 70.

To show actual malice in publication of statement concerning statue, direct proof of intention to injure its value is not necessary.—*Gott v. Pulsifer*, 70.

Action may be maintainable for publishing defamatory words by writing or printing, although they would not have been actionable if spoken merely.—*Tillson v. Robbins*, 329; *Moore v. Francis*, 333.

Action maintainable for the publication, by writing or printing, of a charge such as, if believed, would naturally tend to expose a person to public hatred, contempt, or ridicule, or to deprive him of the benefits of public confidence and social intercourse, without allegations of special damage, or of any fact to make such publication import a charge of crime.—*Tillson v. Robbins*, 330.

In a civil action for libel in the state of New York, where the publication is admitted, and the words are unambiguous, the question of libel or no libel is one of law, which the court must decide.—*Moore v. Francis*, 332.

Publication in a newspaper of a statement imputing insanity to a teller in a bank, libelous per se, as tending to injure him in his employment.—*Moore v. Francis*, 335.

It is not a legal excuse that defamatory matter was published accidentally or inadvertently or with good motives, and in an honest belief in its truth.—*Moore v. Francis*, 335.

Action not maintainable for a publication in a newspaper of a notice to the public that a saloonkeeper, to get rid of a just claim in court, set up as a defense an existing prohibitory liquor law, under which no action for the price of liquors sold in violation of the provisions thereof could be maintained.—*Homer v. Engelhardt*, 336.

Where a letter, containing defamatory matter, is dictated by the author to a clerk, who takes it down in shorthand, and then writes it out in full by means of a typewriting machine, and the letter thus written is copied by another clerk in a copying press, there is a publication of the letter to both; and the occasion is not privileged.—*Pullman v. Walter Hill & Co.*, 343.

And where such letter, addressed to a firm, is sent by the author in an envelope addressed to the firm, and is opened by a clerk of the firm, in the ordinary course of business, and read by other clerks of the firm, there is a publication of the letter to such clerks; and the occasion is not privileged.—*Pullman v. Walter Hill & Co.*, 343.

In civil actions, proof of the truth of the matter charged as defamatory is a complete justification, without showing that it was published with good motives, and for justifiable ends.—*Castle v. Houston*, 350.

The rule is not changed by the provision of the Constitution of Kansas (Bill of Rights, § 11) that, "in all civil or criminal actions for libel, the truth may be given in evidence to the jury, and, if it shall appear that the alleged libelous matter was published for justifiable ends, the accused party shall be acquitted," as the requirement of proof that the matter was published for justifiable ends, in order that "the accused party shall be acquitted," was limited to criminal prosecutions.—*Castle v. Houston*, 350.

A charge of smuggling goods into the country is libelous.—*Stilwell v. Barter*, 352.

A charge that a party has been actively engaged in smuggling during the war is not justified by proof that he had violated the revenue laws in a single instance previous to the war and in a time of peace.—*Stilwell v. Barter*, 353.

Justification for libel must be as broad as the libel.—*Stilwell v. Barter*, 353.

Whether a libelous communication is privileged is a matter of law.—*Byam v. Collins*, 359.

A libelous letter to an unmarried woman concerning her suitor, not written at her request, but appearing to have been written at the instance of mutual friends, for the purpose of preventing her marriage to him, is not privileged by reason of previous friendship, nor by reason of a request made four years before, and before the acquaintance of the suitor was made, for information of anything known to the writer concerning any young man the person addressed "went with," or any young man in the place.—*Byam v. Collins*, 362.

Proprietors of a mercantile agency, whose business is collecting and communicating to subscribers information as to the character, credit, and pecuniary responsibility of merchants, are liable for a false and injurious report of the failure of certain merchants, published and circulated among all the subscribers, as such a communication is privileged only when made in good faith, to one having an interest in the information.—*Sunderlin v. Bradstreet*, 365.

That such libelous statement was in cipher, understood by the subscribers only, is not a defense to an action for libel.—*Sunderlin v. Bradstreet*, 368.

A newspaper article, charging a candidate for office with forgery, stealing, and cheating, not privileged, even if published with belief in its truth.—*Bronson v. Bruce*, 369.

The qualifications and acts of public officers and candidates for office may be freely commented upon, if the comment be bona fide and without malice.—*Bronson v. Bruce*, 371.

False charges of crime against a candidate for office, though made without malice and in an honest belief of their truth, are not privileged.—*Bronson v. Bruce*, 372.

Information given to the governor of the state for the purpose of influencing his action on a bill which has passed the legislature is prima facie privileged, but if the communication contains defamatory matter, and is unnecessarily published to others, such publication is not privileged.—*Woods v. Wilman*, 375.

As to libelous charges in pleadings, affidavits, or other papers used in the course of the prosecution or defense of an action, the privilege is absolute, however malicious the intent, or however false the charge may have been.—*Moore v. Manufacturers' Nat. Bank*, 377.

But the privilege does not extend to slanderous publications plainly irrelevant and impertinent, voluntarily made, and which the party making them

could not reasonably have supposed to be relevant.—*Moore v. Manufacturers' Nat. Bank*, 378.

## LICENSES.

By landlord to tenant to go upon roof adjoining demised premises for purpose of drying clothes, does not extend to visitor to tenant not using the roof for such purpose.—*Miller v. Woodhead*, 8.

Legal license conferred by process to enter house for purpose of service on person within the house.—*Hager v. Danforth*, 213.

If the owner of land sells chattels thereon, the vendee thereby obtains an implied license to enter on the premises and remove the property; and such license is not revocable.—*Newkirk v. Sabler*, 392; *Giles v. Simonds*, 405.

The abuse of a license to enter premises given by law makes the party a trespasser ab initio; but otherwise where the license to enter was by the person in possession.—*Six Carpenters' Case*, 401.

A verbal contract by the owner of land for the sale of trees standing thereon, to be cut and removed by the purchaser, gives the latter an implied license to enter for that purpose; but such license is revocable at any time, except as to an entry for the purpose of removing trees cut before the revocation.—*Giles v. Simonds*, 406.

Duty of keeping premises in a safe condition, even as to a mere licensee, may arise where affirmative negligence in the management of the property or business of the owner would be likely to subject the licensee to great danger.—*Larmore v. Crown Point Iron Co.*, 556.

## LIENS.

Action maintainable for tortious acts by which lien of creditor on property of debtor is destroyed or defeated.—*Lamb v. Stone*, 20.

## LIGHT AND AIR.

Not subjects of property beyond moment of actual occupancy.—*Guest v. Reynolds*, 4.

Obstruction of access by owner of adjoining land not ground of action unless adverse right thereto has been acquired.—*Guest v. Reynolds*, 4.

English doctrine of prescription for easement of light and air not applicable in Illinois.—*Guest v. Reynolds*, 4.

## LIMITATION OF ACTIONS.

Injuries to adjoining property caused by excavations in mining accrue at time of injury, and not at time of excavation.—*Bonomi v. Backhouse*, 66.

## LOANS.

Action of trespass maintainable by owner of personal property loaned to another for destruction of it by third person, while in possession of borrower.—*White v. Brantley*, 489.

One who, having no knowledge of the ownership of property, borrows it of a person having possession thereof, and, after using it, returns it again to him, supposing him to be the owner, is not liable for a conversion in an action by the true owner.—*Frome v. Dennis*, 507.

Under such circumstances, the failure of the borrower to deliver the property to the owner, upon demand by him after it has been returned to the lender, is not evidence of a conversion.—*Frome v. Dennis*, 507.

## LUNATICS.

See "Insanity."

## MACHINERY.

Leaving a dangerous machine in a public place without precaution against mischief constitutes negligence, although the imprudent and unauthorized act of another may be necessary to realize such mischief.—*Clark v. Chambers*, 108.

## MALICE.

To show actual malice in publication of statement concerning statue, direct proof of intention to injure its value is not necessary.—*Gott v. Pulsifer*, 70.

A person who maliciously induces another to break a contract made by the latter with an employer for his exclusive personal services, where such breach would naturally cause, and does, in fact, cause, injury to the employer, is liable to the employer therefor.—*Bowen v. Hall*, 113.

Malice in fact, in a legal sense, denotes any unlawful act done willfully and purposely, to the prejudice and injury of another; it does not necessarily involve malevolence or ill will towards the plaintiff.—*Pullen v. Glidden*, 265.

Malice in law is such malice as is inferred from the commission of an act wrongful in itself, without justification or excuse.—*Pullen v. Glidden*, 265.

Gravamen of action for combination or conspiracy, by fraudulent and malicious acts, to drive a trader out of business, resulting in damages, is the malice, not the conspiracy.—*Van Horn v. Van Horn*, 295.

Malice in law is inferred, ordinarily, from the speaking of slanderous words, wrongfully and intentionally; but where, on account of the cause of speaking, it is prima facie excusable, malice in fact must be proved by plaintiff.—*Bromage v. Prosser*, 338.

Malice, in common acceptance, means ill will against a person; but in its legal sense it means a wrongful act, done intentionally, without just cause or excuse.—*Bromage v. Prosser*, 338.

Actual malice makes defamatory words actionable, although spoken on a privileged occasion.—*Fresh v. Cutter*, 355.

Malice is implied as well from oral as from written defamation, where the communication is not privileged.—*Byam v. Collins*, 358.

## MALICIOUS PROSECUTION.

See "False Imprisonment."

Making a complaint to a magistrate does not render complainant liable in trespass for acts done under a warrant issued by the magistrate, even if the magistrate has no jurisdiction.—*Barker v. Stetson*, 235.

Where there is no conflict in the evidence in actions for malicious prosecution, the question of probable cause is one of law.—Burns v. Erben, 251.

The essential elements of an action for malicious prosecution consist of a previous unfounded prosecution of the plaintiff by the defendant, commenced without probable cause, conducted with malice, and terminating favorably to the party prosecuted.—Miller v. Milligan, 261.

Where plaintiff fails to show that defendant was the real prosecutor in the former suit, or, if so, that he was without evidence or circumstances justifying a reasonable suspicion of the truth of the charge, the complaint may properly be dismissed.—Miller v. Milligan, 262.

Want of probable cause for the former suit and malice must concur, and the former cannot be inferred from any degree of malice which may be shown.—Miller v. Milligan, 262.

In actions for malicious prosecution, the essential elements are malice and want of probable cause in the proceedings complained of.—Hobbs v. Ray, 264.

The remedy for an arrest under lawful process wrongfully obtained is by action for malicious prosecution.—Hobbs v. Ray, 264.

To sustain an action for malicious prosecution, malice in fact must be shown, as distinguished from malice in law, which is established by legal presumption from proof of certain facts.—Pullen v. Glidden, 265.

But plaintiff is not required to prove "express malice," in the popular signification of the term, as, that defendant was prompted by malevolence, or acted from motives of ill will, resentment, or hatred towards plaintiff. It is sufficient that he prove malice in the legal sense in which an act done willfully and purposely, to the prejudice and injury of another, which is unlawful, is, as against that person, malicious.—Pullen v. Glidden, 265.

Plaintiff must prove, not only express malice on the part of defendant, but absence of probable cause for the prosecution.—Foshay v. Ferguson, 268.

If defendant, in an action for malicious prosecution, had, at the time he made the criminal charge against plaintiff for which the latter brings the action, sufficient grounds for believing that plaintiff was guilty of the offense charged, such probable cause is a defense to the action, although the defendant may previously have agreed with plaintiff not to prosecute, and the complaint may have been afterwards made from a malicious feeling towards plaintiff.—Foshay v. Ferguson, 269.

One causing the arrest of an innocent person on a criminal charge is not exempted from liability therefor by a groundless suspicion, unwarranted by the conduct of the accused or by facts known to the accuser when the accusation was made.—Carl v. Ayers, 271.

Proof that defendant in an action for malicious prosecution submitted all the facts of the case which he knew were capable of proof fairly to his counsel, and acted bona fide on the advice given, negatives, if not the malice, the want of probable cause, even though the facts did not warrant the advice and the prosecution.—Walter v. Sample 273.

Action maintainable for prosecution of civil action maliciously and without probable cause; at least, where there has been deprivation of liberty or taking of property.—Cardinal v. Smith, 275.

Failure of plaintiff in civil action, after procuring arrest of defendant on the writ therein, to have the writ returned, or to appear at the court to which

it is returnable, is a final determination of the action, such that the defendant may maintain an action for malicious prosecution.—*Cardinal v. Smith*, 275.

The entry of a *nolle prosequi* in a criminal case is a sufficient determination of the proceedings to entitle accused to maintain an action for malicious prosecution.—*Woodman v. Prescott*, 279.

An action will not lie for the malicious prosecution of a civil suit without probable cause, where the process in such suit was by a summons only, and not accompanied by arrest of the person or seizure of property, or other special injury not necessarily resulting in all suits prosecuted to recover for like causes of action.—*Smith v. Michigan Buggy Co.*, 281.

Action will lie to recover for injuries to reputation and business, caused by malicious prosecution of a civil action without probable cause, in which a complaint was filed containing false and defamatory matter.—*Wade v. National Bank of Commerce of Tacoma*, 285.

An action for maliciously suing out an excessive attachment may be brought before the termination of the attachment suit, where the validity of the debt on which the attachment issued is not in dispute.—*Zinn v. Rice*, 288.

Action for malicious abuse of process in order illegally to compel a party to give up his property may be sustained without showing that the previous action, in which the process was improperly employed, has been determined, or that the process was sued out without reasonable or probable cause.—*Graininger v. Hill*, 291.

## MARRIAGE.

See "Husband and Wife."

An action lies against one who induces plaintiff to marry a woman on the false representation that she is virtuous.—*Kujek v. Goldman*, 21.

Action maintainable for words spoken of plaintiff by defendant, whereby a contract of marriage between plaintiff and another person was broken off by the latter, although such words are not in themselves actionable, and although plaintiff has a remedy against such other person for breach of the contract.—*Moody v. Baker*, 109.

## MASTER AND SERVANT.

Action maintainable by master against one who entices away his servant, although he has a remedy against the servant upon the contract of employment.—*Moody v. Baker*, 111.

Action maintainable by the employer in a contract for the exclusive personal services of the employé against a third person, who maliciously induces the employé to break the contract, where such breach causes, as a natural and probable consequence, injury to the employer, although the relation between the parties to the contract may not be strictly that of master and servant.—*Bowen v. Hall*, 113.

Where plaintiff ordered coal of defendant, which a third person, without defendant's knowledge or authority, delivered, and in so doing negligently injured plaintiff's building, and defendant, with knowledge of the accident, demanded payment of the coal, such demand was a ratification of the acts of the person delivering the coal, and rendered defendant liable for the injury.—*Dempsey v. Chambers*, 182.

A railroad company, having instructed its gatekeepers not to let passengers pass from its trains to the street until they should pay their fares or show tickets therefor, is liable for false imprisonment by a gate keeper of a passenger who had lost his ticket.—*Lynch v. Metropolitan El. Ry. Co.*, 226.

A combination without justification to injure a man in his trade by inducing his servants to leave his employment, if it results in damage, is actionable.—*Quinn v. Leathem*, 297.

Giving character of servant a privileged communication, for which action of slander or libel will not lie, unless malice in fact be shown.—*Bromage v. Prosser*, 339; *Fresh v. Cutter*, 356.

A person in the employ of another, charged with specific duties, does not, while in the performance of such duties, assume the risk of injury from a vicious animal kept by the employer, which he is informed will be kept fastened.—*Muller v. McKesson*, 488.

The master is liable for a conversion by his apprentice of property taken by the latter in the line of his employment.—*Armory v. Delamirie*, 509.

Employer required to exercise reasonable care in providing safe machinery and appliances for the use of his servant.—*Larmore v. Crown Point Iron Co.*, 556; *Pantzar v. Tilly Foster Min. Co.*, 610.

The act of a workman on a railroad in riding on the pilot of an engine, instead of in the car provided for workmen, although he was informed of the danger of doing so, is negligence on his part, contributing to his injury by a collision of the engine with cars standing on the track, sufficient to defeat a recovery by him against the railroad company therefor.—*Baltimore & P. R. Co. v. Jones*, 568.

A master is responsible civiliter for the wrongful act of his servant causing injury to a third person, whether the act was one of negligence or positive misfeasance, if it was done by the servant while acting for the master, and within the scope of the business intrusted to him.—*Rounds v. Delaware, L. & W. R. Co.*, 602.

Master who authorizes servant to use force against another, when necessary in executing the master's orders, liable for the use of an unnecessary degree of force by the servant, through his misjudgment or violence of temper, giving a right of action to another.—*Rounds v. Delaware, L. & W. R. Co.*, 604.

Master not liable for injury by his servant to another, done under guise and cover of executing the master's orders, but willfully and designedly, for the purpose of accomplishing his own independent, malicious, or wicked purposes.—*Rounds v. Delaware, L. & W. R. Co.*, 604.

An owner of real estate, who engaged a contractor to remove rock from his premises by blasting, is not responsible for the negligence of such contractor or his employes in doing the work.—*Berg v. Parsons*, 606.

One employed by a mining company in constructing a wall in its mine, who is ignorant of the unsafe condition of an overhanging rock, and whose duties do not call him to any place from which its condition could be observed, is not censurable for an omission to observe the danger in time to avoid it; but the company, having notice of the danger, and failing to adopt proper means of protection, is liable for an injury to the employe from the fall of the rock.—*Pantzar v. Tilly Foster Min. Co.*, 610.

Master cannot delegate the performance of the duty to provide for the safety of his servant to a superintendent or other employe, so as to exonerate

himself from liability to a servant who has been injured by its nonperformance.—*Pantzar v. Tilly Foster Min. Co.*, 611.

The rule that the servant takes the risk of the service presupposes that the master has performed the duties of care, caution, and vigilance which the law casts upon him.—*Pantzar v. Tilly Foster Min. Co.*, 613.

An engineer, using a defective engine after being assured that it would be repaired, is not guilty of contributory negligence.—*Hough v. Texas & P. Ry. Co.*, 616.

Where a master has expressly promised to repair a defect in machinery, a servant can recover for injury caused thereby within such a period of time after the promise as it would be reasonable to allow for its performance.—*Hough v. Texas & P. Ry. Co.*, 616.

A carpenter, employed by a railway company to do any carpenter's work for its general purposes, and who, while standing on a scaffolding at work on a shed close to the line of the railway, is thrown down and injured by negligence of porters in the service of the company in shifting an engine on a turn-table so that it strikes a ladder supporting the scaffold, cannot recover damages therefor from the company.—*Morgan v. Vale of Neath Ry. Co.*, 617.

Master not liable to servant for injury caused by negligence of fellow servant, where, although the immediate objects on which the two servants are employed are very dissimilar, yet the risk of negligence of the one is so much a natural and necessary consequence of the employment which the other accepts that it must be included in the risks which have to be considered in his wages.—*Morgan v. Vale of Neath Ry. Co.*, 619.

Wherever an employment in the service of a railway company is such as necessarily to bring the person accepting it into contact with the traffic of the line, risk of injury from the carelessness of those managing the traffic is one of the risks necessarily and naturally incident to such employment, and within the rule.—*Morgan v. Vale of Neath Ry. Co.*, 619.

## MAXIMS.

*Aqua currit, et debet currere, ut currere solebat.*—*Webb v. Portland Manuf'g Co.*, 41; *Barkley v. Wilcox*, 433; *Clinton v. Meyers*, 437; *Merrifield v. Lombard*, 441.

*Actus non facit reum nisi mens sit rea.*—*Bessey v. Olliot*, 118.

*Volenti non fit injuria.*—*Barholt v. Wright*, 194.

The greater the truth, the greater the libel.—*Castle v. Houston*, 346.

*Acta exteriora indicant interiora secreta.*—*Six Carpenters' Case*, 401.

*Cessante ratione cessat ipsa lex.*—*Campbell v. Race*, 411.

*Sic utere tuo ut alienum non lædas.*—*Campbell v. Seaman*, 418.

*Caveat emptor.*—*Grigsby v. Stapleton*, 646.

## MAYHEM.

For a conviction of mayhem for an injury during a conflict, it is not necessary that the accused should have formed the intent before engaging in the conflict.—*Barholt v. Wright*, 196.

## MERCANTILE AGENCIES.

A communication, by proprietors of a mercantile agency, to their subscribers, of a report of the failure of certain merchants, is privileged only when made in good faith, to those having an interest in the information.—*Sunderlin v. Bradstreet*, 365.

False representations to a commercial agency as to the financial standing of a firm, made with the intent that they should be communicated to and acted upon by persons interested in the firm's standing, will sustain an action for deceit by persons who were thereby induced to extend credit to the firm.—*Eaton, Cole & Burnham Co. v. Avery*, 668.

## MINES.

Injuries to adjoining property caused by excavations in mining accrue at time of injury, and not at time of excavation.—*Bonomi v. Backhouse*, 66.

## MISTAKE.

Not an excuse for trespass.—*Hobart v. Haggett*, 490; *Dexter v. Cole*, 492.

## MITIGATION.

The fact that the injuries complained of were inflicted in a fight engaged in by the parties by mutual consent is ground for mitigation of damages.—*Barholt v. Wright*, 196.

Words or insults may be considered in mitigation in damages for assault.—*Daniel v. Giles*, 204.

In an action for assault, evidence that the plaintiff had insulted defendant's wife three hours before the time of the alleged assault is inadmissible in mitigation of damages.—*Dupee v. Lentine*, 206.

Payment of proceeds of sheriff's sale of goods under an invalid levy not available to him in mitigation of damages therefor, being but a continuation and aggravation of the original trespass.—*Welsh v. Wilson*, 546.

## MORAL DUTY.

Violation does not constitute a tort, unless a legal right or duty is violated.—*Lamb v. Stone*, 17.

Ground of privilege for making a defamatory communication.—*Byam v. Collins*, 359.

## MUNICIPAL CORPORATIONS.

A village may recover from an abutting owner the amount which it is compelled to pay a person injured by the defective condition of a sidewalk caused by him.—*Trustees of Village of Canandaigua v. Foster*, 176.

Cannot enforce obedience to by-laws or ordinances by imprisonment, unless expressly authorized to do so by statute.—*Lynch v. Metropolitan El. Ry. Co.*, 225.

Where the duty is imposed by law upon a city to keep its sewers in repair, an omission to make the examination necessary to guard against an obstruction or dilapidation of the sewer, which is an ordinary result of its use, and might have been discovered on inspection, is a neglect of duty which renders the city liable for damages thereby caused, although none of its officials had notice that the sewer was obstructed or out of repair.—*McCarthy v. City of Syracuse*, 541.

## NECESSITY.

Excuse for entry on land of another.—*Newkirk v. Sabler*, 392; *Proctor v. Adams*, 408; *Campbell v. Race*, 409.

## NEGLIGENCE.

Occupant of land lawfully making excavation therein in ordinary manner, not near highway, not liable for injuries to trespasser falling into excavation.—*Gramlich v. Wurst*, 13.

Owner of building, letting rooms in it with right to tenant to go upon roof of extension to dry clothes, not liable for injuries to visitor of tenant received by falling from window of latter's rooms through unprotected skylight in roof of extension.—*Miller v. Woodhead*, 9.

It is a question for the jury, where measure of duty is ordinary and reasonable care, and standard of degree of care shifts with circumstances, or where essential facts are controverted.—*Gramlich v. Wurst*, 12.

Negligence is a question for the court, where there is no conflict of testimony, and the standards by which human conduct is to be governed in cases of like impression with that before the court have been judicially defined.—*Gramlich v. Wurst*, 12.

Exceptional safeguards not required where there are no exceptional hazards.—*Gramlich v. Wurst*, 12.

Failure of owner of tenement house to comply with statute requiring fire escapes to be provided therefor is a breach of duty, for which he is liable to a tenant for damage thereby caused to the latter.—*Willy v. Mulledy*, 30.

Owner of tenement house, who has failed to provide fire escapes therefor, as required by statute, is not relieved from liability for damage thereby caused to a tenant, by the fact that the tenant had occupied the premises for a few days previous to the fire causing the damage.—*Willy v. Mulledy*, 31.

A landowner has the absolute right to have his land remain in its natural condition, and if his neighbor digs upon or improves his own land, so as to injure this right, may maintain an action therefor without proof of negligence.—*Gilmore v. Driscoll*, 49.

Railroad company, doing blasting on its own land and exercising due care, is not liable for injury to adjoining property arising from concussion of the atmosphere or jarring of the ground.—*Booth v. Rome, W. & O. T. R. Co.*, 56.

Where act or omission complained of is not a distinct wrong, damages must be proved to sustain action.—*Chicago, W. D. Ry. Co. v. Rend*, 66.

To make a negligent act the proximate cause of an injury, it is not necessary that particular injury and particular manner in which it occurred might reasonably have been expected to follow.—*City of Dixon v. Scott*, 80.

Leading a horse harnessed to a wagon by tying it behind another wagon is a condition and not a cause of injuries to the horse by a vicious dog.—*Boulester v. Parsons*, 81.

Damage to cargo by water escaping through pipe of steam boiler, in consequence of pipe having been cracked by frost, is due to negligence of captain and not act of God.—*Siordet v. Hall*, 83.

Where child fell through a bridge into canal, in consequence of negligent condition of bridge and without contributory negligence of parents of child, and the father, in an effort to rescue the child, plunged into the canal, and both were drowned, the death of both is attributable to negligence in maintaining bridge.—*Gibney v. State*, 93.

Where defendant was negligent in keeping oil upon a platform, which was subsequently fired by carelessness of another, the acts of the defendant and the third person are not concurrent.—*Stone v. Boston & A. R. Co.*, 99.

Railroad company not liable for property destroyed by fire caused by third person throwing lighted match on oil on the platform at defendant's station.—*Stone v. Boston & A. R. Co.*, 99.

Action for personal injuries from dangerous obstruction in the highway maintainable against person who unlawfully placed it there, although the immediate cause of the injury was the intervening act of another.—*Clark v. Chambers*, 106.

Leaving a dangerous machine in a public place without precaution against mischief constitutes negligence.—*Clark v. Chambers*, 108.

Lunatic liable for negligence in permitting tenement house to be in defective condition.—*Morain v. Devlin*, 127.

What constitutes ordinary care varies with circumstances.—*Brown v. Kendall*, 130.

No liability results from an injury arising from inevitable accident.—*Harvey v. Dunlop*, 131.

No justification admissible where life of one person has been lost by negligence of another, whether by negligent act or negligent omission of duty of the latter.—*Thomas v. Winchester*, 160.

Person guilty of act of negligence, imminently dangerous to lives of others, is liable to one injured thereby, whether there be a contract between them or not; if the act was not so, the negligent party is liable only to the party with whom he contracted, and on the ground that negligence is a breach of the contract.—*Thomas v. Winchester*, 161.

To render an infant who has hired a horse liable for trespass, he must do some positive act which amounts to an election to disaffirm the contract.—*Moore v. Eastman*, 166.

Where an infant who has hired a horse willfully and intentionally injures the animal, an action for trespass will lie for the tort, but not if the injury occurred through unskillfulness.—*Moore v. Eastman*, 166.

In actions of negligence, the liability of defendants is joint and several.—*Kirby v. President, etc., of Delaware & H. Canal Co.*, 170.

Where a judgment was recovered in tort against three defendants jointly interested in the running of a stage for an injury caused to a traveler by the negligence of one of the defendants, who was driving, one of the other defendants, who was compelled to pay the whole amount of the judgment, was entitled to contribution.—*Bailey v. Bussing*, 172.

The rule that there can be no contribution among wrongdoers applies only to cases where there has been an intentional violation of the law, or where the wrongdoer is to be presumed to have known that the act was unlawful.—*Bailey v. Bussing*, 174.

A village may recover from an abutting owner the amount which it is compelled to pay a person injured by the defective condition of a sidewalk caused by him.—*Trustees of Village of Canandaigua v. Foster*, 176.

Where plaintiff ordered coal of defendant, which a third person, without defendant's knowledge or authority, delivered, and in so doing negligently injured plaintiff's building, and defendant, with knowledge of the accident, demanded payment of the coal, such demand was a ratification of the acts of the person delivering the coal, and rendered defendant liable for the injury.—*Dempsey v. Chambers*, 182.

Doctrine of contributory negligence does not apply to cases of commission of intentional wrong.—*Barholt v. Wright*, 196.

A postmaster is not liable for the loss of a letter occasioned by the negligence or wrongful conduct of his clerk, appointed and sworn as required by law, though selected by him and subject to his orders.—*Keenan v. Southworth*, 543.

A person who goes upon the land of another without invitation, to secure employment from the owner of the land, is not entitled to indemnity from such owner for an injury happening from the operation of a defective machine on the premises, not obviously dangerous, which he passes in the course of his journey, though he can show that the owner might have ascertained the defect by the exercise of reasonable care, for as to such person there is no violation of a legal duty.—*Larmore v. Crown Point Iron Co.*, 556.

No right of action for negligence unless there is a violation of legal duty.—*Larmore v. Crown Point Iron Co.*, 556.

In the absence of statute as to guards or of invitation upon the premises, the owner is not liable to a fireman, who has entered in the course of his duties at a fire, for leaving his elevator well open and so stacking his merchandise as to guide one into it.—*Beehler v. Daniels, Cornell & Co.*, 558.

An owner is not liable for injuries caused by the explosion of a steam boiler used by him on his premises, without proof of want of due care and skill on the part of him or his agent.—*Marshall v. Welwood*, 560.

As a general principle, blame must be imputable as a ground of responsibility for damage proceeding from a lawful act.—*Marshall v. Welwood*, 563.

A person is not in law, as a general rule, answerable for the natural consequences of his acts, where such acts are lawful in themselves, and are done with proper care and skill.—*Marshall v. Welwood*, 563.

Where a person's own negligence or want of ordinary care and caution so far contributes to an injury to himself that but for such negligence or want of ordinary care and caution on his own part the injury would not have happened, he cannot recover therefor.—*Baltimore & P. R. Co. v. Jones*, 568.

Negligence of a plaintiff, exposing his property to injury, will not preclude his recovery of damages from a person whose subsequent negligence actually causes injury to the property, if the latter's negligence is the proximate cause of such injury.—*Davies v. Mann*, 571.

A child of such tender years as to be incapable of exercising judgment and discretion cannot be charged with contributory negligence.—*Twist v. Winona & St. P. R. Co.*, 574.

Owner of dangerous machinery, who leaves it in an open place on his own land, not liable for negligence because he fails to take active measures to insure the safety of an intruder,—at least as to one of sufficient mental capacity to be a conscious trespasser.—*Twist v. Winona & St. P. R. Co.*, 574.

But even a child is bound to use such reasonable care as one of his age and mental capacity is capable of using, and his failure to do so is negligence.—*Twist v. Winona & St. P. R. Co.*, 575.

The escape of a child three or four years old into the street through an open window, the doors being locked, is not conclusive evidence of the parent's negligence.—*Mangam v. Brooklyn R. Co.*, 580.

In cases of injuries to infants of tender years, received through the negligence of others, the law imputes to the infants the negligence of the parents.—*Mangam v. Brooklyn R. Co.*, 580.

Where a child four years old was injured while exercising what would be regarded as ordinary care in an adult, the question of the negligence of its parents is immaterial.—*McGarry v. Loomis*, 584.

A child two years of age, who, while under the care of an adult sister, goes upon the track of a horse railroad, and is there run over by the carelessness of the driver of a car thereon, is not deprived of a right of action for the injury, although the sister's carelessness of supervision was, in part, the cause of the injury.—*Newman v. Phillipsburg Horse Car R. Co.*, 585.

A child of tender years is not chargeable with negligence of the person having him in charge.—*Newman v. Phillipsburg Horse Car R. Co.*, 588.

The negligence of a carrier is not imputable to a passenger who exercises no control over the carrier.—*Little v. Hackett*, 593.

Where a passenger jumped from a moving car to escape a threatened collision, the question of negligence is to be judged by the circumstances as they appear to the passenger.—*Twomley v. Central Park, N. & E. R. R. Co.*, 598.

Negligence cannot be imputed by law to a person in his effort to save the life of another in extreme peril, unless made under such circumstances as to constitute rashness in the judgment of prudent persons.—*Eckert v. Long Island R. Co.*, 600.

An owner of real estate, who has engaged a contractor to remove rock from his premises by blasting, is not responsible for the negligence of such contractor or his employes.—*Berg v. Parsons*, 606.

An engineer, using a defective engine after being assured that it would be repaired, is not guilty of contributory negligence.—*Hough v. Texas & P. Ry. Co.*, 616.

## NEGOTIABLE INSTRUMENTS.

One to whom a promissory note is delivered by the payee to be negotiated with instructions not to part with the possession of it without receiving the money, and who delivers the note to a third person under the promise of the latter to get it discounted and return the proceeds, is liable to the payee, as for a conversion of the note, for the loss by the appropriation of the proceeds of the note by such third person.—*Laverty v. Snethen*, 496.

Demand and refusal of bills of exchange do not establish a conversion thereof, when they have previously been accidentally lost and destroyed.—*Salt Springs Nat. Bank v. Wheeler*, 519.

## NOISE.

The right to make a noise for a proper purpose must be measured in reference to the degree of annoyance which others may reasonably be required to submit to, which is to be determined, in connection with the importance of the business, by the effect of noise upon people generally.—*Rogers v. Elliott*, 446.

A use of property which is objectionable solely on account of the noise which it makes is a nuisance, if at all, by reason of its effect upon the health or comfort of those who are within hearing.—*Rogers v. Elliott*, 446.

Ringling the bell of a church, built upon a public street in a thickly settled part of a town, in such manner as to materially affect the health or comfort of all in the vicinity, whether residing or passing there, constitutes a public nuisance.—*Rogers v. Elliott*, 446.

## NOMINAL DAMAGES.

Recoverable for wanton and unnecessary injury to land in the use of an easement therein, although no particular amount of damages is proved.—*Webb v. Portland Manuf'g Co.*, 39.

## NOTICE.

A party causing injuries by alteration of dam is not entitled to notice to abate before action brought.—*Curtice v. Thompson*, 459.

Notice or request to remove a nuisance must be given to occupant of premises on which it exists, before an entry thereon by another to abate it, if it is merely continued by such occupant as alienee of the premises, and he was not himself the wrongdoer by having created the nuisance or neglected to perform some obligation by the breach of which it was created.—*Jones v. Williams*, 476.

## NOXIOUS VAPORS.

The destruction of ornamental and useful trees and vines by the vapors and gases from a brick kiln is such irreparable injury as a court of equity will enjoin.—*Campbell v. Seaman*, 422.

An injury to property by noxious vapors arising on the land of another, to be actionable, must be such as visibly to diminish the value of the property, and the comfort and enjoyment of it; and, in determining that question, the time, locality, and all the circumstances should be taken into consideration.—*St. Helen's Smelting Co. v. Tipping*, 425.

An action for such an injury may be maintained, although the business by the operation of which it is caused is a necessary trade, and the place is a suitable place for such a trade, and it is carried on in a reasonable manner.—*St. Helen's Smelting Co. v. Tipping*, 425.

## NUISANCE.

Annoyance to habitation or estate may constitute a nuisance.—*Guest v. Reynolds*, 3.

Obstruction of street by railroad company, causing injury to plaintiff's business, is a public nuisance causing special injury to plaintiff, for which he might maintain an action or injunction.—*Buchholz v. New York, L. E. & W. R. Co.*, 68.

The unreasonable, unwarrantable, or unlawful use of one's own property, producing material annoyance, inconvenience, discomfort, or hurt to his neighbor, constitutes a nuisance.—*Campbell v. Seaman*, 418.

The burning of brick in a kiln, which produces noxious gases, injuring another's property, is a nuisance, though brick burning is a useful and necessary industry.—*Campbell v. Seaman*, 419.

The writ of injunction is not a matter of grace, but of right, in a proper case, and will be granted to restrain irreparable injury, whether it be to the enjoyment of the necessities or the luxuries of life.—*Campbell v. Seaman*, 422.

A person cannot, by erecting a nuisance upon his land adjoining vacant land owned by another, control or lessen the latter's use of the land, unless he can acquire such right by prescription.—*Campbell v. Seaman*, 423.

An injury to property by noxious vapors arising on the land of another, to be actionable, must be such as visibly to diminish the value of the property, and the comfort and enjoyment of it; and, in determining that question, the time, locality, and all the circumstances should be taken into consideration.—*St. Helen's Smelting Co. v. Tipping*, 425.

An action for such an injury may be maintained, although the business by the operation of which it is caused is a necessary trade, and the place is a suitable place for such a trade, and it is carried on in a reasonable manner.—*St. Helen's Smelting Co. v. Tipping*, 425.

The pollution of a stream of water so as to prevent the use of it for any of the reasonable and proper purposes to which running water is usually applied is an infringement of the rights of other riparian owners, and creates a nuisance which will be enjoined at the suit of those injured.—*Merrifield v. Lombard*, 441.

Acts of an upper riparian proprietor, in so conducting his business as to permit poisonous and corrosive substances to run into the stream by which the machinery of a lower proprietor is corroded and destroyed, will be restrained, as tending to create a nuisance of a continuous character.—*Merrifield v. Lombard*, 442.

An owner of land has no right to use it in such a way as to be a nuisance to neighbor.—*Ballard v. Tomlinson*, 443.

A person who, by reason of a sunstroke, is peculiarly susceptible to the noise caused by the ringing of a church bell, situated directly opposite his house in a thickly populated district, cannot, in the absence of evidence of express malice, or that the bell was objectionable to persons of ordinary health and strength, maintain an action against the custodian of such church for sufferings caused by the ringing of such bell.—*Rogers v. Elliott*, 445.

A use of property which is objectionable solely on account of the noise which it makes is a nuisance, if at all, by reason of its effect upon the health or comfort of those who are within hearing.—*Rogers v. Elliott*, 446.

The right to make a noise for a proper purpose must be measured, in reference to the degree of annoyance which others may reasonably be required to submit to, which is to be determined, in connection with the importance of the business, by the effect of noise upon people generally.—*Rogers v. Elliott*, 446.

The mere keeping of gunpowder in dangerous proximity to the premises of another is a nuisance, rendering the person keeping it liable for injuries caused by its explosion, irrespective of the question of his negligence.—*Heeg v. Licht*, 449.

Persons who, without authority, make or continue a covered excavation in a public street or highway for a private purpose, are liable for all injuries to individuals resulting from the street or highway being thereby less safe for its appropriate use, irrespective of the question of negligence in those who make the excavation.—*Congreve v. Smith*, 454.

That the injuries were caused by the negligence, in covering the excavation, of servants of contractors for that work, who had contracted to do it properly, does not relieve from liability the persons who procured it to be done, and did not object to it, and continued the excavation in its unsafe condition, they being bound, at their peril, to make and at all times keep the street as safe as it would have been if the excavation had not been made.—*Congreve v. Smith*, 454.

Where a cesspool is so constructed by the owner of the premises that the offensive matter deposited therein by his tenants necessarily percolates through to the adjoining premises, the owner is equally liable with the tenants for the injury to the adjoining occupant.—*Fow v. Roberts*, 457.

A party causing a nuisance is not exonerated by conveying the land to another from damages arising after the conveyance.—*Curtice v. Thompson*, 458.

Party causing overflowage by alteration of dam not entitled to notice to abate before action brought.—*Curtice v. Thompson*, 459.

A tenant for years is not liable for keeping a nuisance as it was used before his tenancy commenced, in the absence of a request to remove it, if he does no new act of itself amounting to a nuisance.—*McDonough v. Gilman*, 460.

A tenant for years, who restores a nuisance to a right of way after the same has been abated, is liable therefor, although the same existed before his tenancy; but merely repairing it after it was injured, but not abated, will not make him liable, if it does not become more of a nuisance thereby.—*McDonough v. Gilman*, 460.

The notice to a tenant to remove a nuisance which is kept by him in the manner in which it existed when his tenancy commenced, without any act on his part amounting in itself to a nuisance, must be clear and unequivocal, to make him liable for the continuance.—*McDonough v. Gilman*, 462.

The landlord or grantor who has created a nuisance is himself liable, notwithstanding his lease or grant, for the continuance of the nuisance by his lessee or grantee.—*McDonough v. Gilman*, 462.

Action for nuisance does not lie against a grantee of the premises, unless, after request made to abate it, he does not remove the nuisance.—*McDonough v. Gilman*, 462.

If the right invaded or impaired by an alleged nuisance is a common and public one, a mere deprivation or obstruction of the use, which excludes or hinders all persons alike, and does not cause any special or peculiar damage to any one, furnishes no valid cause of action to an individual, although he may suffer inconvenience or delay greater in degree than others from the alleged obstruction or hindrance.—*Wesson v. Washburn Iron Co.*, 463.

A person may recover for injuries to his premises caused by noise, smoke, and noxious vapors in the operation of another's rolling mills, though many other persons in the same neighborhood are injured in the same way.—*Wesson v. Washburn Iron Co.*, 465.

But an alleged nuisance which injures private property, or the health or comfort of an individual, is in its nature special and peculiar, and is actionable, though it is committed in a manner and under circumstances which would render the guilty party liable to an indictment for a common nuisance.—*Wesson v. Washburn Iron Co.*, 466.

Legislature may authorize use of bells, whistles, etc., by employers for purpose of giving notice to their workmen, under regulation of municipal authorities, although thereby injury is caused to individuals, such as a court of equity would restrain.—*Sawyer v. Davis*, 469.

A statute which authorizes a thing to be done which can be done without creating a nuisance will not be deemed to authorize a nuisance.—*Sawyer v. Davis*, 472.

An act of the Legislature, which directs or allows that to be done which would otherwise be a nuisance, is valid, unless it can fairly be said to be an unwholesome and unreasonable law.—*Sawyer v. Davis*, 472.

Entry on land of another to abate a nuisance thereon, without previous request or notice to the occupant to remove it, not justifiable in the case of a nuisance merely continued by such occupant as alienee of the premises, where he was not himself the wrongdoer by having created the nuisance or neglected to perform some obligation by the breach of which it was created.—*Jones v. Williams*, 476.

A private person may not of his own motion abate a strictly public nuisance.—*State v. White*, 478.

A private person may abate a public nuisance causing special injury to him, where he can do so without a breach of the peace.—*State v. White*, 478.

Where a nuisance consists of improper use of building, the remedy is to stop that use, and not to destroy the building itself.—*Brightman v. Inhabitants of Bristol*, 480.

That a porgy oil factory, not in itself unlawful, becomes a nuisance on account of its location, does not justify its destruction by a mob on their own responsibility.—*Brightman v. Inhabitants of Bristol*, 481.

A dog accustomed to bite persons is a public nuisance, and may be killed by any one when found running at large.—*Muller v. McKesson*, 484.

## OBSTRUCTING PROCESS.

Officer justified in using force necessary to overcome unlawful resistance to process.—*Hager v. Danforth*, 214.

## OFFENSIVE TRADES.

See "Noxious Vapors."

Offensive odors ground of action for nuisance.—*Guest v. Reynolds*, 3.

The business of an undertaker will not be restrained at the suit of an adjoining owner, because such business is an offense to him, or destructive to his

comfort or his enjoyment of his home, unless the acts complained of are of such a nature as to affect all reasonable persons similarly situated.—*Rogers v. Elliott*, 447.

Carrying on a business, although a lawful trade, which of itself produces inconvenience and injury to others, as being offensive to the senses and rendering the enjoyment of life and property uncomfortable, may constitute a nuisance. It is not necessary that it should endanger the health of the neighborhood.—*Heeg v. Licht*, 451.

That a porgy oil factory, not in itself unlawful, becomes a nuisance on account of its location, does not justify its destruction by a mob on their own responsibility.—*Brightman v. Inhabitants of Bristol*, 481.

## OFFICERS.

Protected from action for making arrest, although warrant is void, if regular on its face.—*Rice v. Coolidge*, 27.

When a duty is imposed by statute upon a public officer, any person having a special interest in the performance thereof may sue for a breach thereof causing him damage.—*Willy v. Mulledy*, 30.

Public officer serving process justified in using force necessary to overcome unlawful resistance.—*Hager v. Danforth*, 214.

A judicial officer having general powers is responsible for causing an arrest in all cases over which he has cognizance, unless the case is by complaint or other proceeding put colorably under his jurisdiction.—*Grove v. Van Duyn*, 233.

An officer making an arrest under process issued by a magistrate is liable for false imprisonment, if the process is void on its face.—*Elsemore v. Longfellow*, 240.

Complaint insufficient to justify warrant of arrest, so as to protect officer.—*Elsemore v. Longfellow*, 240.

Under a constitutional provision that no warrant to seize any person shall issue without special designation of the person to be seized, a warrant describing the accused as "a person whose name is not known, but whose person is well known, of V., of the county of K.," is insufficient to protect an officer making an arrest thereunder.—*Harwood v. Siphers*, 247.

Officer has no power to arrest, without a warrant, for a past offense, not a felony, upon information or suspicion thereof.—*Quinn v. Heisel*, 257.

Arrest by officer without a warrant is not justified by a threat or other indication of a breach of the peace unless the facts warrant a belief that the arrest is necessary to prevent the commission of the offense, without reference to any past similar offense of which the person may have been guilty before the officer's arrival.—*Quinn v. Heisel*, 257.

Words not in themselves actionable may be actionable as causing special damage, when spoken of one holding a public office, by exposing him to the hazard of losing his office; but no action can be maintained for such words spoken after the office had expired.—*Forward v. Adams*, 315.

Assessors of taxes act judicially in fixing the value of taxable property, where it is not sworn to as authorized by law; and they are not liable to a civil action by one over whose person and property they had jurisdiction for the purpose of assessment, for failing to make any allowance or de-

duction on account of an exemption of a certain amount to which he was entitled, or for assessing his property at a higher rate than that of others.—*Weaver v. Devendorf*, 535.

Public officer not liable to civil action for judicial determination, however erroneous or malicious, if he had jurisdiction of the case and was authorized to determine it.—*Bradley v. Fisher*, 525; *Weaver v. Devendorf*, 537.

Where the duty is imposed by law on the mayor and common council of a city to make and repair sewers in the city, the duty of determining where sewers shall be located and their dimensions is, in its nature, judicial, and an entire omission to construct a sewer, or a failure to make it of sufficient capacity, creates no liability on the part of the city.—*McCarthy v. City of Syracuse*, 540.

But where a sewer has been determined upon and is constructed, the duties of constructing it properly and keeping it in good condition and repair are ministerial, and negligence in the performance of these duties will render the city liable for damages resulting therefrom.—*McCarthy v. City of Syracuse*, 540.

A postmaster is not liable for the loss of a letter occasioned by the negligence or wrongful conduct of his clerk, appointed and sworn as required by law, although selected by him and subject to his orders.—*Keenan v. Southworth*, 543.

A sheriff or constable who, under an execution, seizes and sells property not belonging to the judgment debtor, though in his possession, is a mere trespasser, and liable to an action by the owner of the property without any demand before suit.—*Boulware v. Craddock*, 544.

Levy of execution by breaking outer door of dwelling of execution debtor invalid, and the fact that the sheriff making such levy sold the goods and paid the proceeds to the execution creditor is not available to him in mitigation of damages.—*Welsh v. Wilson*, 546.

Warrant regular on its face is sufficient authority to a constable to make the arrest commanded therein, although he has knowledge of facts which render the warrant void for want of jurisdiction.—*People v. Warren*, 547.

## OILS.

Negligence of railroad in allowing platform to become saturated with oil is not proximate cause of fire caused by third person throwing lighted match thereon.—*Stone v. Boston & A. R. Co.*, 98.

## OPINIONS.

A statement by a warehouseman in a circular soliciting patronage that the exterior of his warehouse is fireproof is the statement of a matter of fact, not a mere expression of opinion, and if made by him with knowledge that it was false, and with intent to deceive, a person induced thereby to store in the warehouse property which is destroyed by fire communicated to portions of the exterior which are not fireproof, may recover from the warehouseman for the loss so incurred.—*Hickey v. Morrell*, 652.

Statements amounting merely to expressions of opinion not, in general, ground of action for fraud; but where they are to be regarded as affirmations of fact, then, if false, an action can be maintained on them.—*Hickey v. Morrell*, 653.

Representations made by a party to a contractor dredging a harbor, after soundings had been taken for the purpose of ascertaining the character of the work and a chart thereof made, with which the party making the representations was familiar and the other party not, were not mere expressions of opinion, but were matters of fact which could be relied on, though not accompanied with specific statements as to actual measurements having been made.—*Hingston v. L. P. & J. A. Smith Co.*, 665.

## PARENT AND CHILD.

Corporal punishment of child by parent in a reasonable manner justifiable.—*Sheehan v. Sturges*, 211.

Action maintainable by father for seduction of minor daughter, although at the time she is in the employ of and residing with another, without any intention to return to her father, if the father has not relinquished his legal right to her services.—*Mulvehall v. Millward*, 552.

Parent held not guilty of negligence imputable to child.—*Mangam v. Brooklyn R. Co.*, 578.

Where an infant of tender years is injured through the negligence of another, the negligence of the parents is imputable to the infant.—*Mangam v. Brooklyn R. Co.*, 580.

Negligence of parent immaterial, where child was exercising what would be regarded as ordinary care in an adult.—*McGarry v. Loomis*, 584.

## PARTIES.

See "Joint Tort-Feasors."

## PASSAGEWAY.

Using violence to another to force a passage, in a rude, inordinate manner, or any struggle about a passage to a degree that may do hurt, is a battery.—*Cole v. Turner*, 191.

Obstruction in one direction only, leaving the way open in another direction, not an imprisonment.—*Bird v. Jones*, 215.

## PASSENGERS.

May be expelled by railroad company from its train for wanton refusal to comply with rule requiring surrender of tickets on the train.—*Illinois Cent. R. Co. v. Whittemore*, 208; *Lynch v. Metropolitan El. Ry. Co.*, 224.

Regulation by a railroad company that a passenger, who fails, before leaving its trains or premises, to produce a ticket or pay his fare, shall be detained until he does so, is illegal.—*Lynch v. Metropolitan El. Ry. Co.*, 223.

Detention of passenger by carrier, for the purpose of enforcing payment of fare, illegal.—*Lynch v. Metropolitan El. Ry. Co.*, 223.

## PERJURY.

Rule that there can be no conviction of perjury on unaided testimony of one witness is applicable only to criminal proceedings.—*Rice v. Coolidge*, 27.

One who suborns witnesses to swear falsely to defamatory statements concerning another, in a suit to which neither of them is a party, is liable to an action therefor by the person whose character is so defamed.—*Rice v. Coolidge*, 25.

## PHYSICIANS.

To say of a physician, in regard to his treatment of children not over three years of age, that he killed them by giving them teaspoonful doses of calomel, is actionable per se, as imputing to him gross ignorance of his profession; damage being presumed from the nature of the charge.—*Secor v. Harris*, 320.

## PLEADING.

Recovery must be on proof of allegations, not of an independent cause of action.—*Guest v. Reynolds*, 5.

Where special damage from false publication concerning statue was loss of its sale, evidence of its value as scientific curiosity is immaterial.—*Gott v. Pulsifer*, 70.

In an action against an officer for false imprisonment, defense that a felony has been committed must be specifically pleaded.—*White v. McQueen*, 253.

The malicious prosecution of a civil action without probable cause, in which a complaint was filed containing false and defamatory matter, is ground for an action for malicious prosecution.—*Wade v. National Bank of Commerce of Tacoma*, 285.

To show that words were meant to impute larceny, extrinsic circumstances must be shown by a colloquium.—*Stitzell v. Reynolds*, 380.

## POISONS.

Dealer in medicines, selling as a harmless remedy a poison of similar appearance, liable for injuries caused thereby to a patient to whom it was administered, although there was no privity between them.—*Thomas v. Winchester*, 160.

## POLICE POWER.

Legislature may authorize use of bells, whistles, etc., by employers for purpose of giving notice to their workmen, under regulation of municipal authorities, although thereby injury is caused to individuals, such as a court of equity would restrain.—*Sawyer v. Davis*, 469.

## POSSESSION.

Defense of possession of property a justification of assault and battery.—*Scribner v. Beach*, 197; *Commonwealth v. Donahue*, 202.

Property wrongfully taken may be recovered by use of reasonable force.—*Commonwealth v. Donahue*, 202.

The gist of the action of trespass to lands is the injury to the possession, and he only can maintain the action who either has or is entitled to the possession. Where the land is in the actual and exclusive occupation of the

owner's tenant, the owner cannot maintain the action.—*Halligan v. Chicago & R. I. R. Co.*, 398.

The owner of a dog loaned by him to another may maintain trespass for the killing of the dog by a third person while so loaned. Actual possession is not necessary to the maintenance of the action.—*White v. Brantley*, 489.

Where personal property is left in the possession of another under an agreement for a specified time, the owner cannot maintain trespass against a third person for taking such property during such time.—*Lunt v. Brown*, 495.

A person cannot maintain trespass for taking personal property, unless at the time of the taking he had either actual or constructive possession or a right to the immediate possession.—*Lunt v. Brown*, 495.

Trover will not lie for the conversion of personal property unless at the time of the conversion the possession or right to the immediate possession was in plaintiff.—*Gordon v. Harper*, 511.

## POST OFFICE.

A postmaster is not liable for the loss of a letter occasioned by the negligence or wrongful conduct of his clerk, appointed and sworn as required by law, although selected by him and subject to his orders.—*Keenan v. Southworth*, 543.

## PRESCRIPTION.

Easement of light and air not acquired by prescription of 20 years.—*Guest v. Reynolds*, 4; *Miller v. Woodhead*, 7.

Tenant or owner not obliged to fence against adjoining owner or occupier, at common law, except by prescription; and, in that case, only against cattle rightfully in the adjoining close.—*Lawrence v. Combs*, 414.

A person cannot, by erecting a nuisance upon his land adjoining vacant land owned by another, control or lessen the latter's use of the land, unless he can acquire such right by prescription.—*Campbell v. Seaman*, 423.

Where the injury to shrubbery on plaintiff's premises is caused by the burning of anthracite coal in a brick kiln on adjoining premises by defendant, a prescriptive right to continue the nuisance must be based upon 20 years' actual use of such coal, and not 20 years' use of the kiln.—*Campbell v. Seaman*, 424.

## PRESUMPTIONS.

Where there is a distinct legal wrong, law will presume that damage follows as proximate result.—*Chicago, W. D. Ry. Co. v. Rend*, 66.

In such a case as the speaking of words charging a physician with gross ignorance and unskillfulness in his profession, the presumption of damage being violent, and the difficulty of proving it considerable, the law supplies the defect by converting the presumption into proof; and damage is presumed to result from the speaking of the words.—*Secor v. Harris*, 321.

The presumption of negligence or prima facie liability of the owner of a vicious animal by which another person is injured, arising from the fact of its vicious propensity and the owner's knowledge thereof, cannot be rebutted

by proof of any amount of care on the part of the owner in keeping or restraining the animal.—*Muller v. McKesson*, 485.

In an action of trover for the removal by defendant from a jewel of precious stones, the value of which is not known, and which defendant does not produce, the strongest presumption is against him, and the measure of damages is the value of the best stones that would fit the socket.—*Armory v. Delamirie*, 509.

## PRINCIPAL AND AGENT.

Where an agent parts with the property of his principal in a way or for a purpose not authorized, he is liable for a conversion; but if he parts with it in accordance with his authority, although at a less price, or if he misapplies the avails, or takes inadequate for sufficient security, he is not liable for a conversion.—*Laverty v. Snethen*, 499.

## PRIVILEGED COMMUNICATIONS.

See "Libel"; "Slander."

Defamatory words published, spoken in the course of judicial proceedings, are not actionable if they are applicable and pertinent to the subject of inquiry.—*Rice v. Coolidge*, 26.

A libelous letter to an unmarried woman concerning her suitor, not written at her request, but appearing to have been written at the instance of mutual friends, for the purpose of preventing her marriage to him, is not privileged by reason of previous friendship, nor by reason of a request made four years before, and before the acquaintance of the suitor was made, for information of anything known to the writer concerning any young man the person addressed "went with," or any young man in the place.—*Byam v. Collins*, 362.

Defamatory words are not privileged because uttered in strictest confidence by one friend to another, nor because they are uttered after the most urgent solicitation, nor because the interview in which they are uttered is obtained at the instance of the person slandered.—*Byam v. Collins*, 365.

A communication, by proprietors of a mercantile agency, to their subscribers, of a report of the failure of certain merchants, is privileged only when made in good faith, to those having an interest in the information.—*Sunderlin v. Bradstreet*, 365.

A newspaper article, charging a candidate for office with forgery, cheating, and stealing, is not privileged, even if published with the belief of the truth of the charge.—*Bronson v. Bruce*, 369.

False charges of crime against a candidate for office, though made without malice and in an honest belief of their truth, are not privileged.—*Bronson v. Bruce*, 372.

Information given to the governor of a state for the purpose of influencing his action on a bill which has passed the legislature is *prima facie* privileged; but if the communication contains defamatory matter, and is unnecessarily published to others, such publication is not privileged.—*Woods v. Wiman*, 375.

As to slanderous statements made by parties, counsel, or witnesses in the course of judicial proceedings, and libelous charges in pleadings, affidavits, or other papers used in the course of the prosecution or defense of an action,

the privilege is absolute, however malicious the intent, or however false the charge may have been.—*Moore v. Manufacturers' Nat. Bank*, 377.

But the privilege does not extend to slanderous publications plainly irrelevant and impertinent, voluntarily made, and which the party making them could not reasonably have supposed to be relevant.—*Moore v. Manufacturers' Nat. Bank*, 378.

## PRIVITY.

In cases of contract, where there is no legal duty independent of the contract, one not in privity with a party to the contract cannot recover against him in tort for an injury involving a breach of the contract.—*Winterbottom v. Wright*, 155.

Dealer in medicines, selling as a harmless remedy a poison of similar appearance, liable for injuries caused thereby to a patient to whom it was administered, although there was no privity between them.—*Thomas v. Winchester*, 165.

## PROBABLE CAUSE.

Where there is no conflict in the evidence in actions for false imprisonment and malicious prosecution, the question of probable cause is one of law.—*Burns v. Erben*, 251.

Where facts are admitted, probable cause is a question of law.—*White v. McQueen*, 254.

Probable cause is reasonable ground of suspicion, supported by circumstances sufficient to warrant a cautious man in the belief that the person accused is guilty of the offense charged.—*Foshay v. Ferguson*, 268.

Probable cause, which will justify a criminal accusation, is a reasonable ground of suspicion, supported by circumstances sufficiently strong in themselves to warrant a cautious man in his belief that the person accused is guilty of the offense with which he is charged. It does not depend upon the guilt or innocence of the accused, or upon the fact whether a crime has been committed.—*Carl v. Ayers*, 271.

To sustain an action for malicious abuse of process of the court in order illegally to compel a party to give up his property, it need not be averred that the process so improperly employed was sued out without reasonable or probable cause.—*Grainger v. Hill*, 291.

## PROCESS.

See "Officers."

One who instigates and procures an officer to arrest another under a void warrant is liable to an action therefor, although the officer is protected.—*Rice v. Coolidge*, 27.

Use of force by officer necessary to overcome unlawful resistance to service of process justifiable.—*Hager v. Danforth*, 214.

Justice issuing warrant for arrest of person on charge of crime, without jurisdiction, is liable for false imprisonment.—*Blodgett v. Race*, 227.

Making a complaint to a magistrate does not render complainant liable to trespass for acts done under a warrant issued by the magistrate, even if the magistrate has no jurisdiction.—*Barker v. Stetson*, 235.

A complainant, obtaining a warrant from a magistrate having no jurisdiction of the cause and inducing an officer to arrest defendant thereon, is liable, even though the warrant is valid on its face.—*Emery v. Hapgood*, 236.

An officer making an arrest under process issued by a magistrate is liable for false imprisonment, if the process is void on its face.—*Elsmore v. Longfellow*, 240.

Complaint insufficient to justify warrant of arrest, so as to protect officer.—*Elsmore v. Longfellow*, 240.

Liability for arrest under void process attaches when wrong is committed, without such process being vacated or set aside; but process merely irregular must be vacated or annulled before an action can be maintained for damages from its enforcement.—*Fischer v. Langbein*, 242.

Void process is such as the court has no power to award, or has not acquired jurisdiction to issue in the particular case, or which does not, in some material respect, comply in form with the legal requisites of such process, or which loses its vitality in consequence of non-compliance with a condition subsequent, obedience to which is rendered essential.—*Fischer v. Langbein*, 243.

Irregular process is such as a court has general jurisdiction to issue, but which is unauthorized in the particular case by reason of the existence or nonexistence of some fact or circumstance rendering it improper in such a case.—*Fischer v. Langbein*, 243.

Order or process based on a decision of the court involving the exercise of the judicial function, although afterwards set aside as erroneous, is not void, and does not subject the party procuring it to an action for damages thereby inflicted.—*Fischer v. Langbein*, 245.

Under a constitutional provision that no warrant to seize any person shall issue without special designation of the person to be seized, a warrant describing the accused as "a person whose name is not known, but whose person is well known, of V., of the county of K.," is insufficient to protect an officer making an arrest thereunder.—*Harwood v. Siphers*, 247.

Failure of plaintiff in civil action to have writ returned, or to appear at the court to which it is returnable, a final determination of the action.—*Cardinal v. Smith*, 275.

An action for maliciously suing out an excessive attachment may be brought before the termination of the attachment suit, where the validity of the debt on which the attachment issued is not in dispute.—*Zinn v. Rice*, 288.

Action maintainable for malicious abuse of process.—*Grainger v. Hill*, 289.

That a criminal prosecution has not been terminated is no defense to an action for abuse of process in such prosecution.—*White v. Apsley Rubber Co.*, 293.

An action lies for abuse of process where one arrested under criminal warrant for malicious injury to personalty is not released until he abandons a claim of right to occupy the certain house.—*White v. Apsley Rubber Co.*, 293.

Breaking of inner door, by officer, to serve process, justifiable.—*Williams v. Spencer*, 412.

Not lawful for officer, in order to serve civil process, to break open outer door of dwelling of the party, although such dwelling is also used by the party for transaction of business.—*Welsh v. Wilson*, 546.

A warrant regular on its face is a sufficient authority to a constable to make the arrest commanded therein, although he has knowledge of facts which render the warrant void for want of jurisdiction.—*People v. Warren*, 547.

## PROMISSORY NOTES.

See "Negotiable Instruments."

## PROPERTY.

Light and air not subjects of property beyond moment of actual occupancy.—*Guest v. Reynolds*, 4.

In subterranean waters is presumed to be in owner of the fee.—*Ocean Grove Camp Meeting Ass'n v. Commissioners of Asbury Park*, 59.

Action for libel concerning plaintiff's property not maintainable without proof of special damage.—*Gott v. Pulsifer*, 70.

Defense of property a justification of an assault and battery, unless unreasonable force is used.—*Scribner v. Beach*, 197; *Commonwealth v. Donahue*, 202.

The unreasonable, unwarrantable, or unlawful use of one's own property, producing material annoyance, inconvenience, discomfort, or hurt to his neighbor, constitutes a nuisance.—*Campbell v. Seaman*, 418.

Owner of land has an absolute property in surface water thereon before it leaves the land and becomes part of a definite watercourse.—*Barkley v. Wilcox*, 433.

Riparian owner has no property in the water of the stream, but a simple use of it while it passes.—*Clinton v. Myers*, 437.

The finder of an article has such a property therein as will enable him to keep it as against all but the rightful owner, and he may maintain trover for its conversion.—*Armory v. Delamirie*, 509.

## PROXIMATE OR REMOTE CAUSE.

Action for tort not maintainable for remote, contingent, or indefinite damages.—*Lamb v. Stone*, 19; *Clark v. Chambers*, 100; *Vandenburgh v. Truax*, 85; *Lowery v. Manhattan Ry. Co.*, 90; *Milwaukee & St. P. Ry. Co. v. Kellogg*, 78; *Bowen v. Hall*, 115.

To warrant a finding that negligence, or an act not amounting to wanton wrong, is the proximate cause of an injury, it must appear that the injury was the natural and probable consequence of the negligence or wrongful act, and that it ought to have been foreseen in the light of attendant circumstances. When there is no intermediate efficient cause, disconnected from the primary fault, and self-operating, which produced the injury, the original wrong must be considered as reaching to the effect, and proximate to it.—*Milwaukee & St. P. Ry. Co. v. Kellogg*, 77.

To make a negligent act the proximate cause of an injury, it is not necessary that particular injury and particular manner in which it occurred might reasonably have been expected to follow.—*City of Dixon v. Scott*, 80.

Damage to cargo by water escaping through pipe of steam boiler, in consequence of pipe having been cracked by frost, is due to negligence of captain and not act of God.—*Siordet v. Hall*, 83.

One who does an illegal or mischievous act, likely to prove injurious to others, is answerable for the consequences directly and naturally resulting therefrom, although he did not intend to do the particular injury which followed.—*Vandenburgh v. Truax*, 85.

Where fire is allowed to fall from a locomotive of an elevated railway on a horse and his driver in the street below, the immediate running away of the horse and his collision with a person on the sidewalk are natural and probable consequences, and the wrongful act is the proximate cause of the injury to such person, notwithstanding error of judgment of the driver in endeavoring to manage and control the horse.—*Lowery v. Manhattan Ry. Co.*, 90.

Where child fell through a bridge into canal, in consequence of negligent condition of bridge and without contributory negligence of parents of child, and the father, in an effort to rescue the child, plunged into the canal, and both were drowned, the death of both is attributable to negligence in maintaining bridge.—*Gibney v. State*, 93.

The rule that, where an intelligent responsible human being has intervened between the original cause and the resulting damage, the law will not look behind him, is not true where it was the duty of the original wrongdoer to anticipate and provide against such intervention.—*Stone v. Boston & A. R. Co.*, 97.

Allowing railroad platform to become saturated with oil is not proximate cause of fire caused by third person throwing lighted match thereon.—*Stone v. Boston & A. R. Co.*, 98.

It seems that the liability arising from unlawful acts, negligence, or omissions of duty is confined to those consequences only which, in the ordinary course of things, were likely to arise, and which might therefore reasonably be expected to arise, or which it was contemplated by the parties might arise, from such acts, negligence, or omissions.—*Clark v. Chambers*, 106.

Wherever a man does an act which in law and in fact is a wrongful act, and such an act as may, as a natural and probable consequence of it, produce injury to another, and which in the particular case does produce such an injury, an action on the case will lie. If these conditions are satisfied, the action does not the less lie because the natural and probable consequence of the act complained of is an act done by a third person, or because such act so done by the third person is a breach of duty or contract by him, or an act illegal on his part, or an act otherwise imposing an actionable liability on him.—*Bowen v. Hall*, 115.

Cancer of the breast, if found to be the result of an injury to plaintiff caused by defendant's negligence, may be considered in estimating damages in an action for such injury.—*Baltimore City Pass. Ry. Co. v. Kemp*, 135.

Remote negligence on the part of a plaintiff is no answer to his action for an injury, the proximate cause of which is attributable to want of proper care on defendant's part.—*Davies v. Mann*, 571.

Witness not liable in damages for evidence given by him in a suit, although false, by which another is injured.—*Mobile Life Ins. Co. v. Brame*, 625.

Action not maintainable by contractor for support of town paupers against a person inflicting personal injury upon such a pauper, on the ground that

thereby the contractor was subjected to extra expenditure.—*Mobile Life Ins. Co. v. Brame*, 625.

Action not maintainable by one party to a contract against a third person persuading the other party to the contract not to perform it.—*Mobile Life Ins. Co. v. Brame*, 625.

An insurance company has no right of action against the person who feloniously or negligently causes the death of a person insured by it, for the loss thereby caused the company, such loss being too remote and indirect.—*Mobile Life Ins. Co. v. Brame*, 625.

## PUBLICATION.

To sustain an action for slander, the defamatory words must have been spoken in the presence or hearing of some person other than the plaintiff.—*Terwilliger v. Wands*, 326; *Shefill v. Van Deusen*, 341.

That the words were spoken in a public place is immaterial.—*Shefill v. Van Deusen*, 341.

Where a letter, containing defamatory matter, is dictated by the author to a clerk, who takes it down in shorthand, and then writes it out in full by means of a typewriting machine, and the letter thus written is copied by another clerk in a copying press, there is a publication of the letter to both, and the occasion is not privileged.—*Pullman v. Walter Hill & Co.*, 343.

And where such letter is sent by the author in an envelope addressed to the firm, and is opened by a clerk of the firm, in the ordinary course of business, and read by other clerks of the firm, there is a publication of the letter to such clerks, and the occasion is not privileged.—*Pullman v. Walter Hill & Co.*, 343.

Information given to the governor of the state for the purpose of influencing his action on a bill which has passed the Legislature is *prima facie* privileged; but if the communication contains defamatory matter, and is unnecessarily published to others, such publication is not privileged.—*Woods v. Wiman*, 375.

## PUNISHMENT.

Of pupil by teacher, in a reasonable manner, justifiable.—*Sheehan v. Sturges*, 210.

## QUESTIONS OF LAW OR OF FACT.

Negligence, in ordinary cases, a question for the jury, but may be a question for the court where there is no conflict of testimony, and the standard of duty or the rights of the parties have been judicially defined.—*Gramlich v. Wurst*, 12.

What is the proximate cause of an injury is ordinarily a question for the jury.—*Milwaukee & St. P. Ry. Co. v. Kellogg*, 77.

What is reasonable force, which may be used in retaking possession of property wrongfully taken by another, is a question of fact for a jury.—*Commonwealth v. Donahue*, 203.

Whether a regulation of a railroad company requiring passengers to surrender their tickets before leaving the trains is reasonable is a question for the court, either with or without testimony on the subject; to submit it to the

jury is error.—*Illinois Cent. R. Co. v. Whittemore*, 208; *Lynch v. Metropolitan El. Ry. Co.*, 225.

The reasonableness of the punishment administered by a teacher to his pupil is purely a question of fact.—*Sheehan v. Sturges*, 210.

Where there is no conflict in the evidence in actions for false imprisonment and malicious prosecution, the question of probable cause is one of law.—*Burns v. Erben*, 251.

Where facts are admitted, probable cause is a question of law.—*White v. McQueen*, 254.

In a civil action for libel in the state of New York, where the publication is admitted and the words are unambiguous, the question of libel or no libel is one of law, which the court must decide.—*Moore v. Francis*, 332.

Where, on the evidence in an action for slander for words spoken in answer to an inquiry, it is a question of fact whether defendant understood the person making such inquiry as asking for information to regulate his own conduct, this should be submitted to the jury for consideration before they are to consider the question of malice in answering.—*Bromage v. Prosser*, 339.

Whether a libelous communication is privileged is a question of law.—*Byam v. Collins*, 359.

Whether a servant, for whose tortious act suit is brought against his master, was, in doing such act, while apparently engaged in executing the master's orders, in fact pursuing his own purposes, without reference to his master's business, and was acting maliciously and willfully, is ordinarily a question for the jury on all the facts and circumstances proved.—*Rounds v. Delaware, L. & W. R. Co.*, 605.

## RAILROADS.

See "Elevated Railroads"; "Master and Servant"; "Street Railroads."

A statute providing that a railroad shall be responsible to owner of property injured by fire is not unavailing, because not providing remedy or prescribing form of action.—*Stearns v. Atlantic & St. L. R. Co.*, 33.

Railroad company, doing blasting on its own land and exercising due care, not liable for injury to adjoining property arising from incidental jarring.—*Booth v. Rome, W. & O. T. R. Co.*, 56.

Railroad company, changing direction of street at crossing and obstructing former street, may be compelled to restore crossing by injunction at suit of abutting owner.—*Buchholz v. New York, L. E. & W. R. Co.*, 68.

Railroad company not liable for property destroyed by fire caused by third person throwing lighted match on oil on the platform at defendant's station.—*Stone v. Boston & A. R. Co.*, 99.

Incidental injury to owner of property near a railroad, caused by the necessary noise, vibration, dust, and smoke from passing trains, which would amount to an actionable nuisance if the operation of the railroad were not authorized by the Legislature, must, if the running of the trains is so authorized, be borne by the individual, without compensation or remedy in any form.—*Sawyer v. Davis*, 469.

The act of a workman on a railroad in riding on the pilot of an engine instead of in the car provided for workmen, although he was informed

of the danger of doing so, is negligence on his part, contributing to his injury by a collision of the engine with cars standing on the track, sufficient to defeat a recovery by him against the railroad company therefor.—*Baltimore & P. R. Co. v. Jones*, 568.

The conduct of a boy nearly 10½ years old, of average intelligence, familiar in a general way with the working of a railroad turn-table, knowing that it was dangerous to play upon it, and that so doing was forbidden by the railroad company, and having been warned by his father not to go upon it, who nevertheless engages with other boys in swinging upon it while in motion, and is injured thereby, is such contributory negligence as will defeat a recovery for such injury, although he may not have been of sufficient age and discretion to understand the full extent of the danger.—*Twist v. Winona & St. P. R. Co.*, 575.

A person seeing a small child on a railroad track, in extreme peril from a rapidly approaching train, owes to the child the duty to rescue it if he can do so without incurring great danger to himself; and the law will not impute negligence to an effort by him to rescue the child, unless made under such circumstances as to constitute rashness, in the judgment of prudent persons.—*Eckert v. Long Island R. Co.*, 599.

A trespasser upon the cars of a railroad train is entitled to be protected against unnecessary injury by the railroad company or its servants in exercising the right of removing him.—*Rounds v. Delaware, L. & W. R. Co.*, 605.

Wherever an employment in the service of a railway company is such as necessarily to bring the person accepting it into contact with the traffic of the line, risk of injury from the carelessness of those managing the traffic is one of the risks necessarily and naturally incident to such employment, and within the rule.—*Morgan v. Vale of Neath Ry. Co.*, 619.

## RATIFICATION.

Where plaintiff ordered coal of defendant, which a third person, without defendant's knowledge or authority, delivered, and in so doing negligently injured plaintiff's building, and defendant, with knowledge of the accident, demanded payment of the coal, such demand was a ratification of the acts of the person delivering the coal, and rendered defendant liable for the injury.—*Dempsey v. Chambers*, 182.

## RELEASE.

Release of one joint tort-feasor releases the others.—*Gunther v. Lee*, 179.

In a release to one of several joint tort-feasors, a proviso that the right to recover against the other shall not be affected is void.—*Gunther v. Lee*, 180.

Release of right of action for false imprisonment procured by duress is void.—*Guillaume v. Rowe*, 238.

## RELIGIOUS SOCIETIES.

Loss of membership, with no material advantages attaching thereto, not such special damage as will sustain action for speaking words not actionable in themselves.—*Roberts v. Roberts*, 63.

## REMEDIES.

New remedy adopted, to prevent failure of justice or to enforce settled principles of law; but not where redress may be had by any of the forms of action already known and practiced.—*Lamb v. Stone*, 17; *Rice v. Coolidge*, 28.

Action may be either *ex contractu* or *ex delicto*, for breach of right or duty created by law, the performance of which has been assumed by contract.—*Baltimore City Pass. Ry. Co. v. Kemp*, 138, note II.

Where a nuisance consists of improper use of building, the remedy is to stop that use, and not to destroy the building itself.—*Brightman v. Inhabitants of Bristol*, 480.

## REMOTE DAMAGES.

See "Proximate or Remote Cause."

## REPLEVIN.

Bare possession of property, though wrongfully obtained, is sufficient title to enable the party enjoying it to maintain replevin against a mere stranger who takes it from him.—*Anderson v. Gouldberg*, 510.

## RESISTING PROCESS.

Officer justified in using force necessary to overcome unlawful resistance to process.—*Hager v. Danforth*, 214.

## REVERSIONS.

Action maintainable for injury to reversionary right.—*Webb v. Portland Manuf'g Co.*, 41.

## RIPARIAN RIGHTS.

See "Waters and Water Courses."

## ROOF.

Of extension of building with unprotected skylight below windows of rooms let by owner, not a structure dangerous to tenant of rooms.—*Miller v. Woodhead*, 8.

## SALES.

The bringing of an *ex contractu* action by the owner against some of the wrongdoers is an election to treat the transaction as a sale, and the owner cannot subsequently sue the others for conversion.—*Terry v. Munger*, 140.

The owner of goods wrongfully converted, which remain in the wrongdoer's possession, may waive the tort and sue on an implied contract of sale, in which event title to the goods passes to the wrongdoer.—*Terry v. Munger*, 140.

Representations made to a father to induce him to purchase a gun for the use of his son, known by the vendor making them to be false, by which the son is induced to use the gun, operate as a distinct fraud on the son, and he may maintain an action against the vendor for injuries sustained in consequence thereof.—*Winterbottom v. Wright*, 154.

Where an infant falsely represents himself to be of age, and induces another to sell him goods, the seller cannot maintain trover against him for the goods.—*Slayton v. Barry*, 168.

Where there is a mistake between the seller and purchaser as to the article sold, the seller supposing he has sold one article while the purchaser supposes he has bought another, of which he takes possession, he will be liable in trespass.—*Hobart v. Hagget*, 490.

Where one sells the property of another he is liable in an action of trespass for the removal of such property by the purchaser from lands of the owner.—*Wall v. Osborn*, 494.

When an article is offered for sale, a material latent defect must be disclosed, or the sale will be avoided.—*Grigsby v. Stapleton*, 646.

One who sells cattle, which he knows have a contagious disease, not easily detected except by those acquainted with it, for a sound price, to a purchaser having no knowledge of the fact, if he does not disclose the fact to the purchaser, is guilty of fraudulent concealment of a latent defect, which will defeat an action for the price. Under such circumstances the rule caveat emptor does not apply.—*Grigsby v. Stapleton*, 647.

Action not maintainable by purchaser of a farm against the vendor for false representations by the latter, to induce the purchase, in regard to the absence of a noxious grass from the farm, where it appears that any attempt to find such grass on the farm, made before the purchase, would have disclosed its existence.—*Long v. Warren*, 660.

When the real quality of property sold is obvious to ordinary intelligence, and the vendor and vendee have equal knowledge or equal means of acquiring information, and the truth or falsity of representations made by the vendor as to its quality may be ascertained by the vendee by the exercise of ordinary inquiry or diligence, and they are not made for the purpose of throwing him off his guard and diverting him from making inquiry and examination, which every prudent person ought to make, the vendee has no ground of action for fraud, though he purchases the property in reliance upon such representations.—*Long v. Warren*, 660.

## SCHOOLS.

The reasonableness of the punishment administered by a teacher to his pupil is purely a question of fact.—*Sheehan v. Sturges*, 210.

Corporal punishment of pupil by teacher to enforce compliance with proper rules for good conduct and order of school justifiable, if inflicted with sound discretion and judgment, and adapted to the offender as well as to the offense.—*Sheehan v. Sturges*, 211.

In an action against a teacher for assault and battery in whipping a pupil, evidence of habitual misconduct of the pupil prior to the punishment is admissible on behalf of defendant.—*Sheehan v. Sturges*, 211.

## SEDUCTION.

See "Criminal Conversation."

Action maintainable by father for seduction of minor daughter, although at the time she is in the employ of and residing with another, without any intention to return to her father, if the father has not relinquished his legal right to her services.—*Mulvehall v. Millward*, 552.

## SELF-DEFENSE.

Justifies assault and battery.—*Scribner v. Beach*, 197; *Commonwealth v. O'Malley*, 200; *Commonwealth v. Donahue*, 202.

## SHERIFFS.

See "Officers."

## SKY-LIGHTS.

In roof of extension of building, below windows of rooms let by owner, not a structure dangerous to tenant of rooms, even after removal of wire screen intended to protect the glass.—*Miller v. Woodhead*, 8.

## SLANDER.

See "Libel"; "Slander of Title."

Loss of membership in religious society, to which no material advantages are attached, not such special damage as will sustain action for speaking words not actionable in themselves.—*Roberts v. Roberts*, 63.

Imputing unchastity to a woman not actionable at common law unless special damage be shown.—*Roberts v. Roberts*, 63.

Action maintainable for words spoken of plaintiff by defendant, whereby a contract of marriage between plaintiff and another person was broken off by the latter, although such words are not in themselves actionable, and although plaintiff has a remedy against such other person for breach of the contract.—*Moody v. Baker*, 109.

Slander against a married woman, of such a kind as to cause injury to her husband's business, as a natural consequence, gives the husband a cause of action.—*Van Horn v. Van Horn*, 296.

Words imputing a charge which, if true, would subject the party charged to an indictment for a crime involving moral turpitude, or subject him to an infamous punishment, are in themselves actionable.—*Young v. Miller*, 301.

Where the removal of a landmark is, by statute, indictable as a misdemeanor, and punishable by fine and imprisonment in the county jail, as it also involves moral turpitude, words charging a person with that offense are actionable per se.—*Young v. Miller*, 301.

Words imputing a criminal offense punishable corporally are actionable per se in England, even though such offense be not punishable by indictment.—*Webb v. Beavan*, 305.

Words imputing charge of swindling do not necessarily imply a crime, and are not actionable per se.—*Chase v. Whitlock*, 306.

Words imputing a crime in another state, which is not punishable in the state in which such words were spoken, may be actionable in the latter state.—*Van Ankin v. Westfall*, 307.

To say that a person is a "returned convict," thereby imputing an offense punishable by transportation, is actionable per se; as, although the punishment has been suffered, the obloquy remains.—*Fowler v. Dowdney*, 308.

Action maintainable for words imputing crime, though spoken by way of interrogation only, if, according to the natural and fair construction of the language used, in connection with the circumstances, the hearers had a right to believe that defendant intended to charge plaintiff with the commission of a criminal offense.—*Gorham v. Ives*, 309.

Words imputing crime, but spoken and understood with reference to transactions which were known not to amount to the charge the words import, are not actionable.—*Van Rensselaer v. Dole*, 310.

To say of a man that he has the venereal disease is actionable, as tending to exclude him from society; but if, when the charge was made, he had such disease, the truth of the charge is a justification.—*Golderman v. Stearns*, 313.

To say of a man that he had the venereal disease, and, having married, communicated it to his wife, and that he was "the guilty one," does not necessarily import the commission by him of the criminal offense of adultery or fornication so as to render the words actionable as imputing such offense.—*Golderman v. Stearns*, 313.

To say of a person formerly appointed to negotiate a treaty with Indians that he bribed them to sign the treaty is not actionable except as affecting him in such office, and no action can be maintained therefor where the office had expired before the words were spoken.—*Forward v. Adams*, 314.

Words not in themselves actionable may be actionable as affecting the person of whom they are spoken in his office, profession, trade, employment, etc.—*Forward v. Adams*, 315; *Ireland v. McGarvish*, 318.

Ground of action for speaking words not actionable in themselves, but only in consequence of the special character of the party of whom they are spoken, is that such party is disgraced or injured in his profession or trade, or exposed to the hazard of losing his office in consequence of the slanderous words; not that his general reputation is affected by them.—*Forward v. Adams*, 316.

Words not actionable in themselves, but only in consequence of the special character of the person of whom they are spoken, are not actionable when spoken after such person has ceased to sustain that special character.—*Forward v. Adams*, 316.

To render words actionable on account of the official or professional character of the person of whom they are spoken, it is not enough that they tend to injure him in his office or calling; they must relate to his official or business character, and impute misconduct to him in that character.—*Ireland v. McGarvish*, 318.

To charge a physician with gross ignorance and unskillfulness in his profession, though in but a single act, is actionable per se; damage is presumed from the very nature of the charge.—*Secor v. Harris*, 320.

Damages caused by the repetition of defamatory words, without proper occasion for repeating them, are not the natural and legal consequence of the first speaking of them, and the person so repeating them is alone liable for such damages.—*Terwilliger v. Wands*, 324.

Only injuries affecting the reputation constitute such special damage as will sustain an action for speaking words not in themselves actionable. The words must in fact disparage the character, and this disparagement must be evidenced by some positive loss arising therefrom, directly and legitimately, as a fair and natural result.—*Terwilliger v. Wands*, 325.

Illness and inability to labor, caused by the effect on one's mind of defamatory words reported to have been spoken of him, are not special damages for which he can maintain an action of slander.—*Terwilliger v. Wands*, 326.

No action can be maintained for the speaking of defamatory words to the person of whom they are spoken only, no other person being present or within hearing.—*Terwilliger v. Wands*, 326; *Shefill v. Van Deusen*, 341.

There are many kinds of charges which would not be actionable per se if spoken, but are so if written.—*Tillson v. Robbins*, 329.

Slanderous words are those which (1) import a charge of some punishable crime; or (2) impute some offensive disease which would tend to deprive a person of society; or (3) which tend to injure a party in his trade, occupation, or business; or (4) which have produced some special damage.—*Moore v. Francis*, 332.

Malice in law is inferred, ordinarily, from the speaking of slanderous words, wrongfully and intentionally; but where, on account of the cause of speaking, it is prima facie excusable, malice in fact must be proved by plaintiff.—*Bromage v. Prosser*, 338.

Where, on the evidence in an action for slander for words spoken in answer to an inquiry, it is a question of fact whether defendant understood the person making such inquiry as asking for information to regulate his own conduct, this should be submitted to the jury for consideration before the question of malice in answering.—*Bromage v. Prosser*, 339.

That the defamatory words were spoken in a public place is immaterial.—*Shefill v. Van Deusen*, 341.

A charge of being a thief cannot be justified by showing that the person accused is guilty of cheating, fraud, or false pretenses.—*Youngs v. Adams*, 352.

A communication affecting the character of a servant, made by his former master to another whose service he is about to enter, although made voluntarily, if in good faith, without malice, in the belief that it is done in the discharge of a duty, and with a full conviction of its truth, is privileged, and damages cannot be recovered therefor without a finding of malice.—*Fresh v. Cutter*, 356.

But the speaking of such words, though with a belief in their truth, to a person other than the new master, would not be privileged.—*Fresh v. Cutter*, 357.

Malice is implied as well from oral as from written defamation, where the communication is not privileged.—*Byam v. Collins*, 358.

As to slanderous statements made by parties, counsel, or witnesses in the course of judicial proceedings, the privilege is absolute, however malicious the intent, or however false the charge may have been.—*Moore v. Manufacturers' Nat. Bank*, 377.

But the privilege does not extend to slanderous publications plainly irrelevant and impertinent, voluntarily made, and which the party making them could not reasonably have supposed to be relevant.—*Moore v. Manufacturers' Nat. Bank*, 378.

To show that words were meant to impute larceny, colloquium showing extrinsic circumstances is necessary.—*Stitzell v. Reynolds*, 380.

Statement that plaintiff had her hogs in another's corn and carried corn away is not actionable without special damage.—*Stitzell v. Reynolds*, 380.

Distinctions stated between "averment," colloquium," and "innuendo."—*Stitzell v. Reynolds*, 381.

## SLANDER OF TITLE.

To maintain an action for slander of title, the words must not only be false, but must be uttered maliciously, and be followed as a natural and legal consequence by pecuniary damage to plaintiff, which must be specially alleged and proved.—*Kendall v. Stone*, 384.

Although one who has entered into a contract to purchase land is influenced to desire to withdraw therefrom by statements as to the vendor's title made by a third person, if the vendor assents to a rescission of the contract, he cannot recover damages from the third party for the loss of the sale, as it is not the legal consequence of the words spoken.—*Kendall v. Stone*, 384.

False and malicious statements disparaging an article of property when followed by special damage to the owner, are actionable.—*Wilson v. Dubois*, 386.

Special damage is of the gist of the action for slander of title, and, where the special damage relied on is loss of sale, it is indispensable to allege and prove loss of sale to some particular person.—*Wilson v. Dubois*, 387.

## SPRING GUNS.

Owner of land planting spring guns in it liable to person injured thereby, while merely straying on the land.—*Gramlich v. Wurst*, 14; *Clark v. Chambers*, 102.

## SPRINGS.

See "Subterranean Waters."

## SQUIB.

Action maintainable for personal injury from lighted squib first thrown by defendant, although injury would not have happened without intervention of others.—*Clark v. Chambers*, 102; *Vandenburg v. Truax*, 85.

## STATUTES.

Action maintainable for violation of statutory duty.—*Willy v. Mulledy*, 30.

An action lies under a statute providing for injuries by railroad fire, though the statute does not provide remedy or prescribe form of action.—*Stearns v. Atlantic & St. L. R. Co.*, 33.

A statute which authorizes a thing to be done which can be done without creating a nuisance will not be deemed to authorize a nuisance.—*Sawyer v. Davis*, 472.

## STEAM BOILERS.

Owner of land not liable for injuries caused by the explosion of a steam boiler used by him on his premises, without proof of want of due care and skill on the part of him or his agent.—*Marshall v. Welwood*, 560.

## STEAM WHISTLES.

Use of steam whistles by employers for purpose of giving notice to their workmen, although such as to cause injury to individuals which a court of equity would restrain, may be authorized by legislature, subject to regulation by municipal authorities.—*Sawyer v. Davis*, 469.

## STREET RAILROADS.

A child two years of age, who, while under the care of an adult sister, goes upon the track of a horse railroad and is there run over by the carelessness of the driver of a car thereon, is not deprived of a right of action for the injury, though the sister's carelessness of supervision was, in part, the cause of the injury.—*Newman v. Phillipsburg Horse Car R. Co.*, 585.

## SUBORNATION OF PERJURY.

Action maintainable against one who suborns witnesses to swear falsely to defamatory statements concerning another, in a suit to which neither of them is a party.—*Rice v. Coolidge*, 27.

## SUBTERRANEAN WATERS.

Opening wells and drawing water therefrom, not a ground for action by owner of adjoining land, although the supply of water to his wells is thereby diminished.—*Ocean Grove Camp Meeting Ass'n v. Commissioners of Asbury Park*, 59.

Digging on one's own land, although it intercepts percolating waters which supply the spring of another, is not a cause of action.—*Barkley v. Wilcox*, 433.

Pollution of percolating waters gives right of action to adjoining owner.—*Ballard v. Tomlinson*, 443.

Owner of land has right of action for pollution of percolating waters by adjoining owner.—*Ballard v. Tomlinson*, 443.

## SURFACE WATERS.

Owner of land has an absolute property in surface water thereon before it leaves the land and becomes part of a definite water course.—*Barkley v. Wilcox*, 433.

The owner of land, which is so situated that the surface waters from the land above naturally descend upon and pass over it, may in good faith, and for the purpose of building upon and improving his land, fill and grade it, although thereby the water is prevented from reaching it, and is detained upon the land above.—*Barkley v. Wilcox*, 434.

## SWINDLING.

Words imputing charge of swindling do not necessarily imply a crime, and are not actionable per se.—*Chase v. Whitlock*, 306.

## TAXATION.

Assessors of taxes act judicially in fixing the value of taxable property, where it is not sworn to as authorized by law; and they are not liable to a civil action by one over whose person and property they had jurisdiction for the purpose of assessment, for failing to make any allowance or deduction on account of an exemption of a certain amount to which he was entitled, or for assessing his property at a higher rate than that of others.—*Weaver v. Devendorf*, 535.

## TENANCY IN COMMON.

See "Joint Tenancy and Tenancy in Common."

## TENEMENT HOUSES.

Failure of owner of tenement house to comply with statute requiring fire escapes to be provided therefor is a breach of duty for which he is liable to a tenant for damages thereby caused to the latter.—*Willy v. Mulledy*, 30.

Owner liable for defective condition, although insane.—*Morain v. Devlin*, 127.

## TORT.

See particular heads.

Violation of legal right or legal duty necessary to constitute a tort.—*Guest v. Reynolds*, 4; *Miller v. Woodhead*, 7; *Gramlich v. Wurst*, 9; *Rich v. New York Cent. & H. R. R. Co.*, 148.

Violation of merely moral right or duty does not constitute a tort.—*Lamb v. Stone*, 17.

Wrongful intent not essential to constitute tort, in cases of trespass.—*Bessey v. Olliot*, 118; *Guille v. Swan*, 120.

No liability in tort for purely accidental injuries.—*Brown v. Kendall*, 129.

Violation of duty of care on the part of a common carrier of passengers, towards a passenger, is a tort.—*Baltimore City Pass. Ry. Co. v. Kemp*, 136.

Action of tort maintainable for breach of right or duty created by law, though its performance has been assumed by contract.—*Baltimore City Pass. Ry. Co. v. Kemp*, 138, note 11.

No accurate and perfect definition of word "tort."—*Rich v. New York Cent. & H. R. R. Co.*, 745.

Where, upon a breach of contract, there is not merely a broken promise, but also trust betrayed and confidence abused—constructive fraud, or a negligence that operates as such—such fraud or negligence makes the breach of contract actionable as a tort.—*Rich v. New York Cent. & H. R. R. Co.*, 149.

Omission to perform a contract obligation may constitute a tort, where the omission is also an omission of a legal duty, even though such legal duty arises from circumstances not elements of the contract, but merely connected with it and dependent upon it.—*Rich v. New York Cent. & H. R. R. Co.*, 150.

In cases of contract, where there is no legal duty independent of the contract, one not in privity with a party to the contract cannot recover against him in tort for an injury involving a breach of the contract.—*Winterbottom v. Wright*, 155.

Where, in cases of contract, the law imposes a duty towards third persons who are not parties to the contract, such persons may recover in an action of tort.—*Thomas v. Winchester*, 157.

Dealer in medicines selling as a harmless remedy a poison of similar appearance, liable for injuries caused thereby to a patient to whom it was administered, although there was no privity between them.—*Thomas v. Winchester*, 160.

The liability for torts is joint and several.—*Kirby v. President, etc., of Delaware & H. Canal Co.*, 170.

It seems that one who procures another to break a contract by the latter with a third party is responsible for the breach only where malice to such third person is shown, giving a distinct cause of action for the malice which caused the breach of contract resulting in damages to him.—*Van Horn v. Van Horn*, 295.

## TREES.

A verbal contract by the owner of land for the sale of trees standing thereon, to be cut and removed by the purchaser, gives the latter an implied license to enter for that purpose; but such license is revocable at any time, except as to an entry for the purpose of removing trees cut before the revocation.—*Giles v. Simonds*, 406.

Trees and vines, although planted merely for ornament or luxury, are entitled to protection by injunction from injury by destructive vapors.—*Campbell v. Seaman*, 422.

One cutting timber on land of another, though without intent to trespass, and by mistake as to the line of division, is liable as a trespasser.—*Hobart v. Hagget*, 491.

## TRESPASS.

See "Trespassers."

In trespass for sawing off top of fence, plaintiff entitled to recover full value of property destroyed, though fence was improved by defendant's act.—*Fisher v. Dowling*, 44.

Action maintainable for a trespass without wrongful intent.—*Bessey v. Olliot*, 118; *Guille v. Swan*, 120; *Hobart v. Hagget*, 491.

An infant of six liable for compensatory damages for entering premises of another and destroying shrubbery and flowers.—*Huchting v. Engel*, 163.

Where an infant who has hired a horse willfully and intentionally injures the animal, an action for trespass will lie for the tort, but not if the injury occurred through unskillfulness.—*Moore v. Eastman*, 166.

To render an infant who has hired a horse liable for trespass, he must do some positive act which amounts to an election to disaffirm the contract.—*Moore v. Eastman*, 166.

Parties advising or aiding in committing trespass are liable, though not personally present at the time of its commission.—*Bell v. Miller*, 181.

Making a complaint to a magistrate does not render complainant liable in trespass for acts done under a warrant issued by the magistrate, even if the magistrate has no jurisdiction.—*Barker v. Stetson*, 235.

An entry upon land of another without his permission, express or implied, or the license or authority of law, constitutes a trespass, for which damages are recoverable, though merely nominal.—*Hatch v. Donnell*, 388; *Newkirk v. Sabler*, 391.

For appropriation of soil of a public highway trespass lies by the owner of land through which highway passes.—*Gidney v. Earl*, 390.

Entry upon lands of another excusable, if necessary for preservation of life.—*Newkirk v. Sabler*, 392.

Entry on land of another excusable, if necessary to prevent irremediable loss or destruction of property of third person.—*Newkirk v. Sabler*, 392; *Proctor v. Adams*, 408.

Entry on lands of another justified by license, express or implied, though by parol.—*Newkirk v. Sabler*, 392; *Giles v. Simonds*, 405.

Entry on lands of another excused by necessity.—*Newkirk v. Sabler*, 392; *Proctor v. Adams*, 408; *Campbell v. Race*, 409.

One has no right to enter upon land of another for the purpose of taking away a chattel thereon which belongs to him, where there is no license, express or implied, nor any legal excuse, as on the ground of necessity, even though such chattel is unlawfully detained there.—*Newkirk v. Sabler*, 393.

Owner of domestic animals liable for injuries committed by them while trespassing on the close of another, irrespective of his knowledge of their vicious propensities; but not liable for injuries by them unless they were trespassing, or he has knowledge of their vicious propensities.—*Van Leuven v. Lyke*, 395.

Trespass to land an injury to the possession.—*Halligan v. Chicago & R. I. R. Co.*, 398.

A single trespass may be committed on several closes, and one action maintained therefor as one trespass.—*Halligan v. Chicago & R. I. R. Co.*, 398.

The gist of the action of trespass to lands is the injury to the possession, and he only can maintain the action who either has or is entitled to the possession. Where the land is in the actual and exclusive occupation of the owner's tenant, the owner cannot maintain the action.—*Halligan v. Chicago & R. I. R. Co.*, 398.

One going into a public tavern and there ordering and drinking wine, does not, by refusing to pay therefor, become a trespasser *ab initio*; mere not doing is no trespass.—*Six Carpenters' Case*, 401.

The abuse of a license to enter premises given by law makes the party a trespasser *ab initio*; but otherwise where the license to enter was given by the person in possession.—*Six Carpenters' Case*, 401.

Action maintainable by one tenant in common against another upon an actual ouster.—*Murray v. Hall*, 403.

Breaking of inner door, by officer to serve process, justifiable.—*Williams v. Spencer*, 412.

The owner of an ox which, while being driven along the highway, escapes and enters premises of another adjoining the highway, is not liable for the damages thereby done, unless there was negligence on his part.—*Tillett v. Ward*, 413.

One or two adjoining proprietors upon whose land cattle stray from the highway, from which they pass, through a defect in that portion of the division fence which he was by law bound to keep in repair, upon the land of the other, is not liable to the latter in trespass therefor, although he would be liable for such trespass by cattle rightfully on his land.—*Lawrence v. Combs*, 415.

Trespass maintainable by owner of a dog for the killing of it, although it was not at the time in his possession, but loaned to another.—*White v. Brantley*, 489.

One cutting timber on land of another, though without intent to trespass, and by mistake as to the line of division, is liable as a trespasser.—*Hobart v. Hagget*, 491.

To maintain trespass *de bonis asportatis*, actual forcible dispossession of property is not necessary; any unlawful interference with or exercise of acts of ownership over property, to the exclusion of the owner, will constitute a trespass, though there was no wrongful intent, and the property was taken accidentally or by mistake.—*Dexter v. Cole*, 492.

Plaintiff's sheep, running at large in the highway, became mixed with sheep which defendant was driving to market. Defendant separated all but four of them, which he drove to market with his flock. *Held*, that he was liable in trespass.—*Dexter v. Cole*, 492.

Where a party sold a mill standing on the lot of his neighbor, and promised to assist the purchaser in its removal, the vendor was liable to an action of trespass, although there was no proof of his being present or aiding in removal of the building by such purchaser.—*Wall v. Osborn*, 493.

Trespass to personal property an injury to the right of possession.—*Lunt v. Brown*, 495.

A person cannot maintain trespass for taking personal property, unless, at the time of the taking, he had either actual or constructive possession or a right to the immediate possession.—*Lunt v. Brown*, 495.

Where personal property is left in the possession of another under an agreement for a specified time, the owner cannot maintain trespass against a third person for taking such property during such time.—*Lunt v. Brown*, 495.

An action for trespass on land can be brought only within the state in which the land lies.—*Ellenwood v. Marietta Chair Co.*, 679.

## TRESPASSERS.

See "Trespass."

Not entitled to redress for injuries negligently inflicted, unless some legal duty towards them is violated.—Gramlich v. Wurst, 12.

Occupant of land lawfully making excavation therein in ordinary manner, not near highway, not liable for injuries to trespasser falling into excavation.—Gramlich v. Wurst, 13.

Trespasser upon the cars of a railroad train is entitled to be protected against unnecessary injury by the railroad company or its servants in exercising the right of removing him.—Rounds v. Delaware, L. & W. R. Co., 605.

## TROVER.

See "Conversion of Personal Property."

## TRUSTEE PROCESS.

Trustee entitled to equitable set-off for advances made to or debts paid for principal debtor in good faith.—Lamb v. Stone, 18.

## UNDERTAKERS.

The business of an undertaker will not be restrained by injunction at the suit of an owner of premises adjoining the place, because such business is an offense or a nuisance to him, or destructive to his comfort, or his enjoyment of his home, unless the acts complained of are of such a nature as to affect all reasonable persons similarly situated.—Rogers v. Elliott, 447.

## VENDOR AND VENDEE.

See "Sales."

## VIEW.

Obstruction of light, air, and view by owner of adjoining land is not a ground of action unless adverse right to the enjoyment of such privileges has been acquired.—Guest v. Reynolds, 4.

## VOID PROCESS.

See "Process."

A complainant, obtaining a warrant from a magistrate having no jurisdiction of the cause and inducing an officer to arrest defendant thereon, is liable, even though the warrant is valid on its face.—Emery v. Hapgood, 236.

An officer making an arrest under process void on its face is liable for false imprisonment.—Elsemore v. Longfellow, 240.

## VOTERS.

See "Elections and Voters."

## WAREHOUSEMEN.

A statement by a warehouseman, in a circular soliciting patronage, that the exterior of his warehouse is fireproof, is the statement of a matter of fact, not a mere expression of opinion, and if made by him with knowledge that it was false, and with intent to deceive, a person induced thereby to store in the warehouse property which is destroyed by fire communicated to portions of the exterior which are not fireproof may recover from the warehouseman for the loss so incurred.—*Hickey v. Morrell*, 652.

## WARRANT.

See "Arrest"; "False Imprisonment"; "Process."

## WATERS AND WATER COURSES.

See "Subterranean Waters"; "Surface Waters."

To an action by one of several owners of mills and privileges on the same dam, to restrain the other owners from drawing water from the head of the pond, it is no answer that defendants have improved the supply of water to the pond by a reservoir higher up the stream.—*Webb v. Portland Manuf'g Co.*, 42.

One of several owners of mills and mill privileges on the same dam is entitled to his proportion of the whole stream at the dam, undivided and undiminished in its natural flow, and may restrain the other owners by injunction from drawing from the head of the pond any part of the water, even a part less than their proportion.—*Webb v. Portland Manuf'g Co.*, 42.

Action maintainable for injuries from breach of statutory duty by defendants to maintain works to keep out or carry off water, that being the substantial cause of the mischief, although wrongful acts or negligence of third persons increased or contributed to the damage.—*Clark v. Chambers*, 105.

Action maintainable for injuries caused by horses taking fright at a stream of water allowed by defendants to spout up in the road, and falling into a ditch constructed in the road by others as contractors for a sewer, and negligently left by them unfenced.—*Clark v. Chambers*, 105.

Uniform or uninterrupted flow not essential to constitute a water course.—*Barkley v. Wilcox*, 430.

In time of drought, riparian owner may detain the water of the stream by a dam for such time as necessary to raise a head sufficient to enable him to use the water for the purpose of his machinery, if the machinery is such as is adapted to the power of the stream at its usual stage.—*Clinton v. Myers*, 438.

It is immaterial that such detention of the water makes the lower riparian owner's rights more valuable, if he insists upon his legal right to the water as it would naturally flow, and such right is of any value to him.—*Clinton v. Myers*, 440.

As against a lower riparian owner on a natural water course, an upper riparian owner of land on both sides of the stream has no right to detain such surplus of the waters thereof as he does not require for present use, until they may be wanted by him in a dry season.—*Clinton v. Myers*, 440.

The pollution of a stream of water, so as to prevent the use of it for any of the reasonable and proper purposes to which running water is usually applied, is an infringement of the rights of other riparian owners, and creates a nuisance which will be enjoined at the suit of those injured.—*Merrifield v. Lombard*, 441.

Injuries from flowage caused by making the dam higher or tighter than before give right of action.—*Curtice v. Thompson*, 459.

## WELLS.

See "Subterranean Waters."

## WINDOWS.

Obstruction of view or light not ground of action, unless adverse right has been acquired.—*Guest v. Reynolds*, 4.

## WITNESSES.

That witness swearing falsely is protected by his personal privilege from a civil suit therefor does not exempt the person suborning him from liability to one defamed thereby, who was not a party to the action.—*Rice v. Coolidge*, 27.

Witness not liable in damages for evidence given by him in a suit, although false, by which another is injured.—*Mobile Life Ins. Co. v. Brame*, 625.

## WORDS AND PHRASES.

*Damnum absque injuria*.—*Gramlich v. Wurst*, 13; *Webb v. Portland Mfg. Co.*, 36; *Winterbottom v. Wright*, 156; *Castle v. Houston*, 349; *Campbell v. Seaman*, 418; *Clinton v. Myers*, 437; *Marshall v. Wellwood*, 564.

*Damnum cum injuria*.—*Lamb v. Stone*, 17.

*Injuria sine damno*.—*Webb v. Portland Mfg. Co.*, 37.

*Ex jure naturæ*.—*Webb v. Portland Mfg. Co.*, 41.

"Injury" implies something more than damage.—*Brown v. Kendall*, 129.

"Ordinary care" means, in general, that kind and degree of care which prudent and cautious men would use, such as is required by the exigency of the case, and such as is necessary to guard against probable danger.—*Brown v. Kendall*, 130.

"Tort." No accurate and perfect definition of "tort."—*Rich v. New York Cent. & H. R. R. Co.*, 145.

"Imprisonment" includes, besides mere loss of freedom to go where one pleases, restraint within limits defined by an exterior will or power.—*Bird v. Jones*, 216.

"Malice," in common acceptation, means ill will against a person; but, in its legal sense, it means a wrongful act done intentionally, without just cause or excuse.—*Bromage v. Prosser*, 338.

Distinctions stated between "averment," "colloquium," and "innuendo."—*Stitzell v. Reynolds*, 381.

"Water course." A natural water course is a natural stream, flowing in a defined bed or channel, with banks and sides, having permanent sources of supply. It is not essential that the flow should be uniform or uninterrupted.—*Barkley v. Wilcox*, 430.

"Conversion" is an unauthorized assumption and exercise of the right of ownership over goods belonging to another, to the exclusion of the owner's rights.—*Laverty v. Snethen*, 497.

## WRITS.

See "Certiorari"; "Execution"; "Injunction"; "Process."







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